

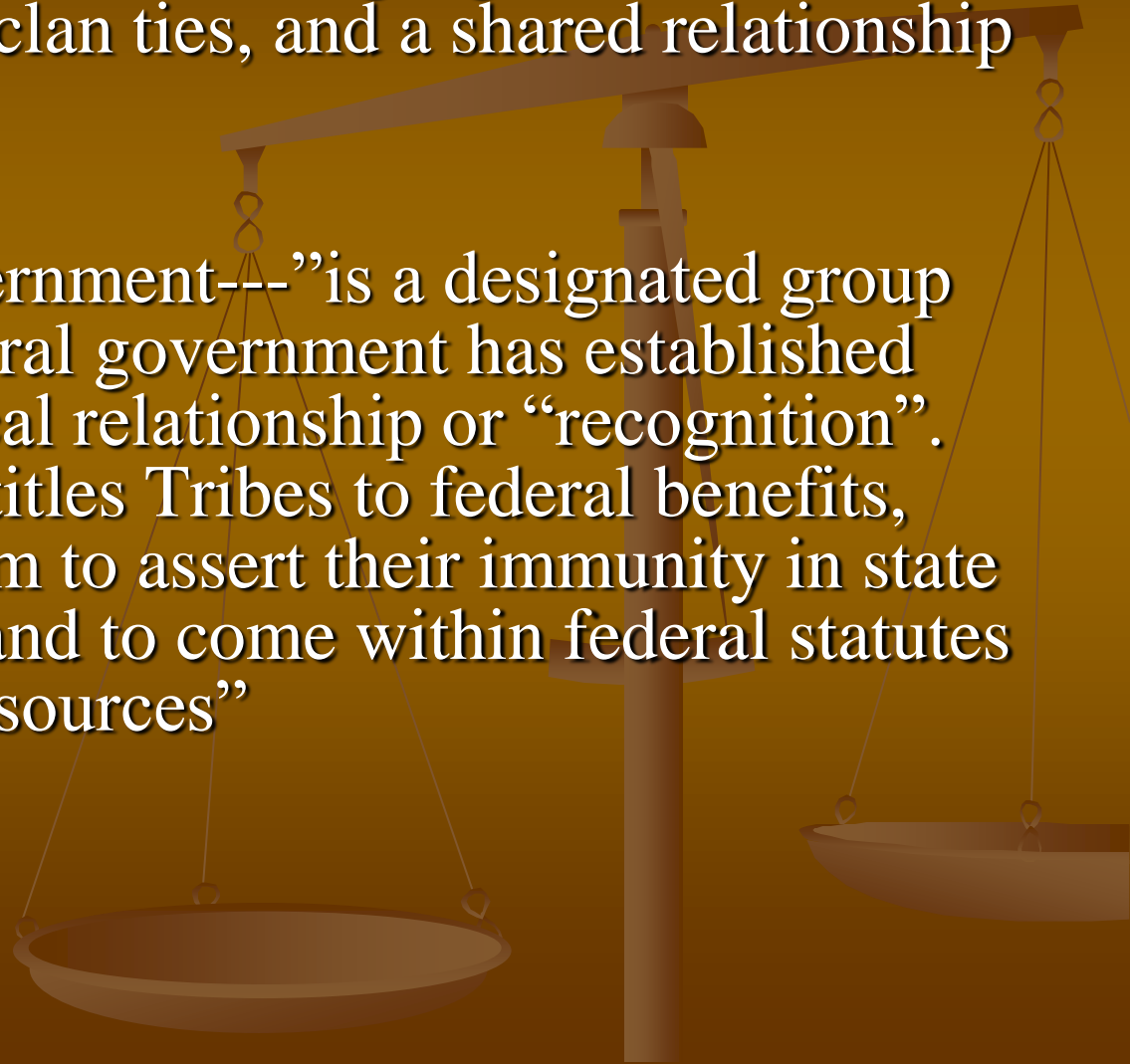
Introduction to Public Law 280



California Indian Legal Services
Dorothy Alther, Executive Director

“Tribe” Defined

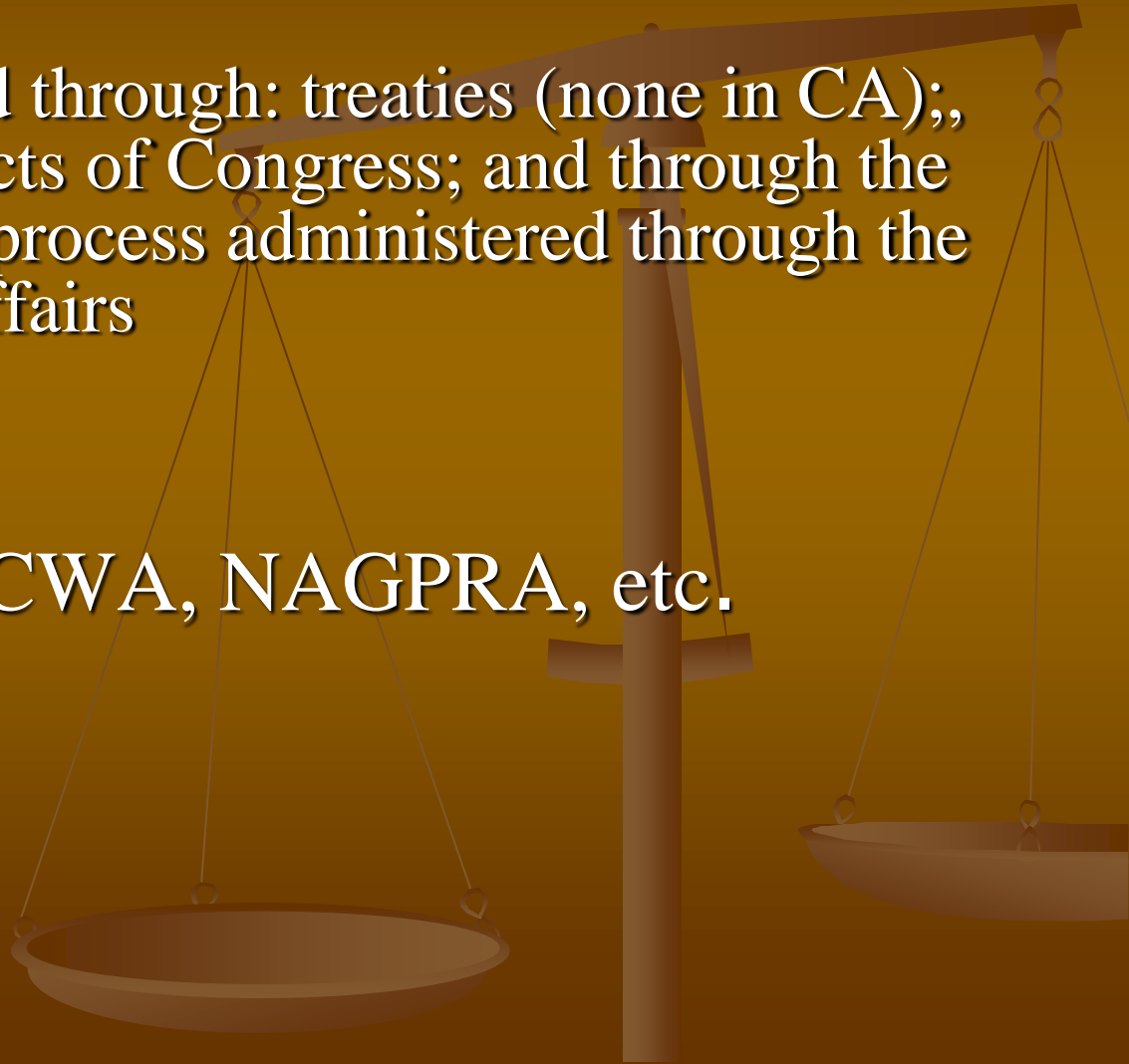
- For Native People—“shared language, rituals, narratives, kinship, clan ties, and a shared relationship to specific land”
- For the federal government---“is a designated group with whom the federal government has established some kind of political relationship or “recognition”. This recognition entitles Tribes to federal benefits, services, allows them to assert their immunity in state and federal courts, and to come within federal statutes that protect tribal resources”



“Tribe” Defined, cont’d

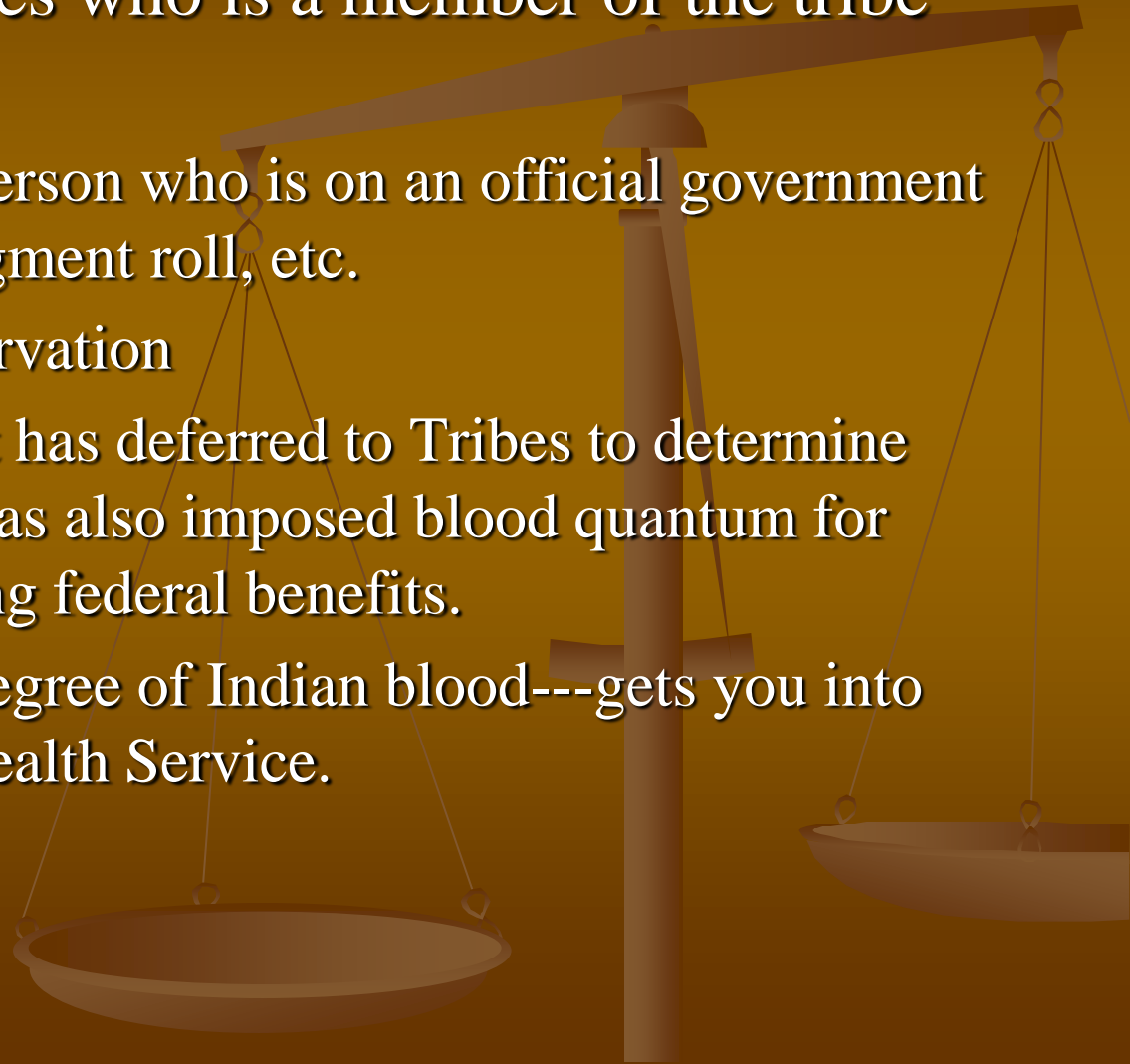
Tribes are recognized through: treaties (none in CA);, Executive Order; Acts of Congress; and through the federal recognition process administered through the Bureau of Indian Affairs

- List of Tribes---ICWA, NAGPRA, etc.



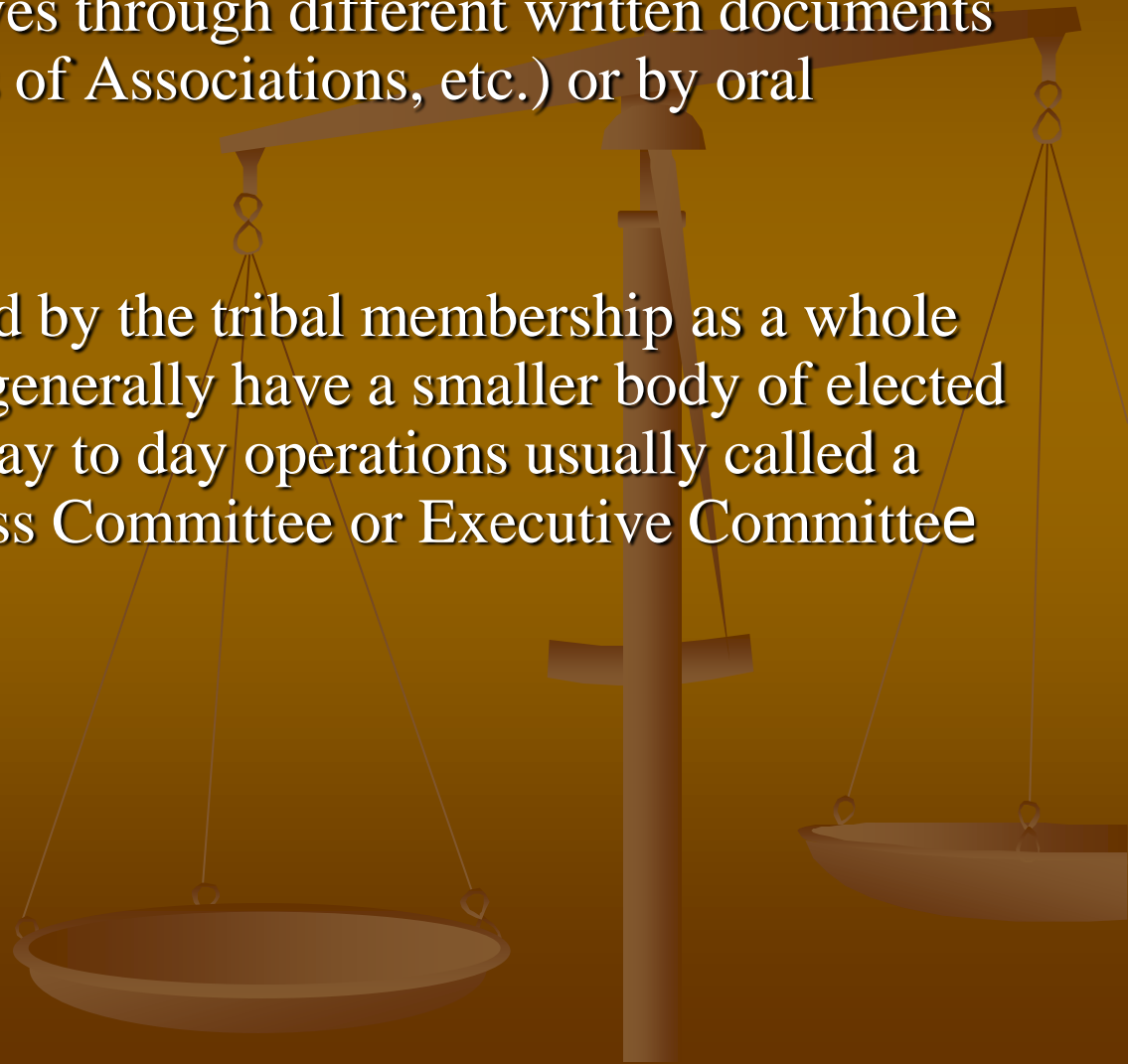
Define “Indian”

- Tribal law determines who is a member of the tribe
 - Blood quantum
 - Descendent of person who is on an official government roll, census, judgment roll, etc.
 - Born on the reservation
- Federal government has deferred to Tribes to determine membership BUT has also imposed blood quantum for purposes of receiving federal benefits.
 - Certificate degree of Indian blood---gets you into the Indian Health Service.



Some Basic Principles cont'd

- Tribes govern themselves through different written documents (Constitutions, Articles of Associations, etc.) or by oral custom and tradition
- Tribes may be governed by the tribal membership as a whole (General Council) but generally have a smaller body of elected members to carry out day to day operations usually called a Tribal Council, Business Committee or Executive Committee

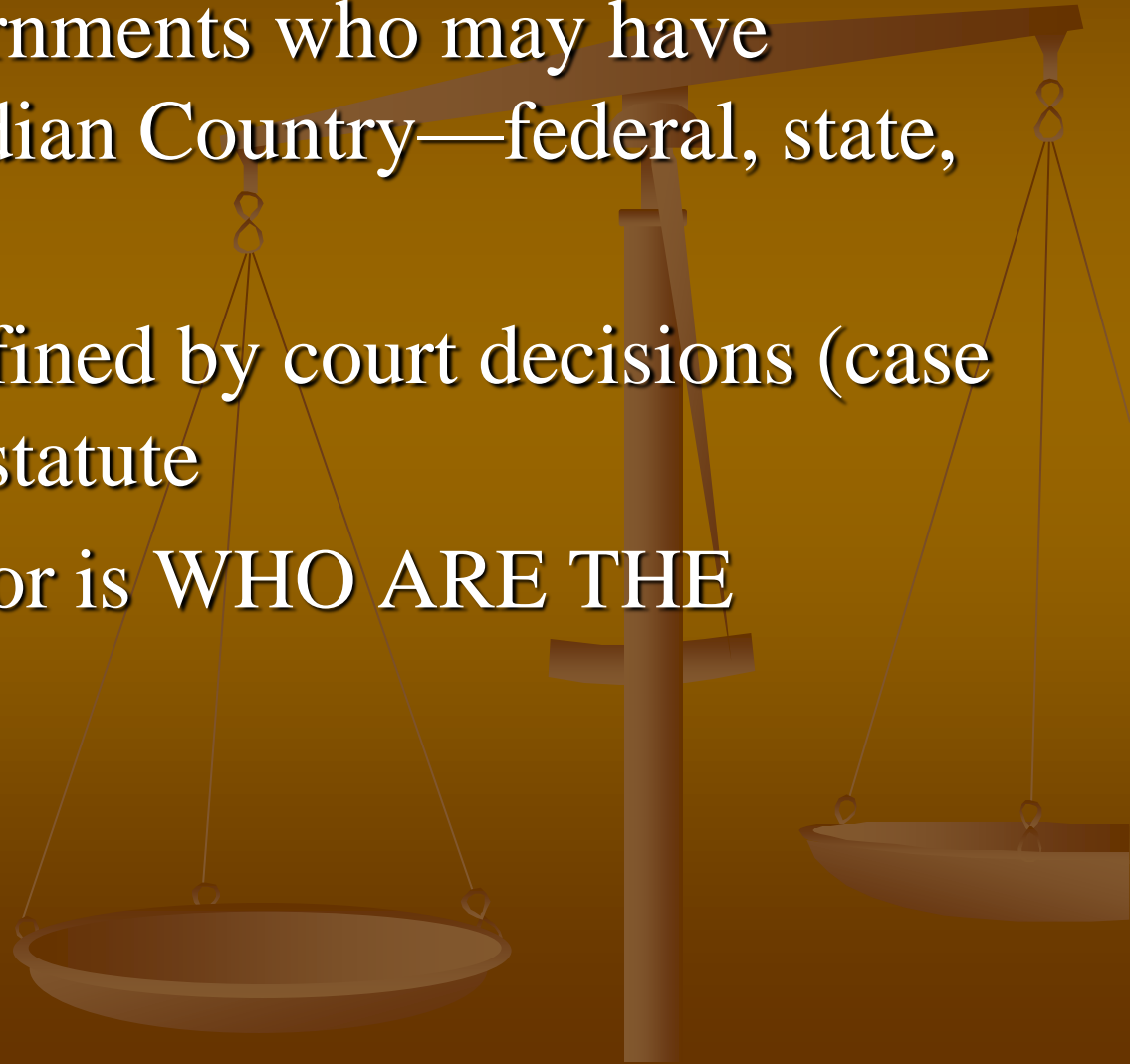


Definitions

- “Indian Country” is defined as:
 - Indian reservations (tribal trust lands);
 - Indian allotments (individual trust lands);
 - “dependent Indian communities” (federal areas set aside for an Indian community and where the federal government and the Tribe provide essential services.) (18 U.S.C. 1151)

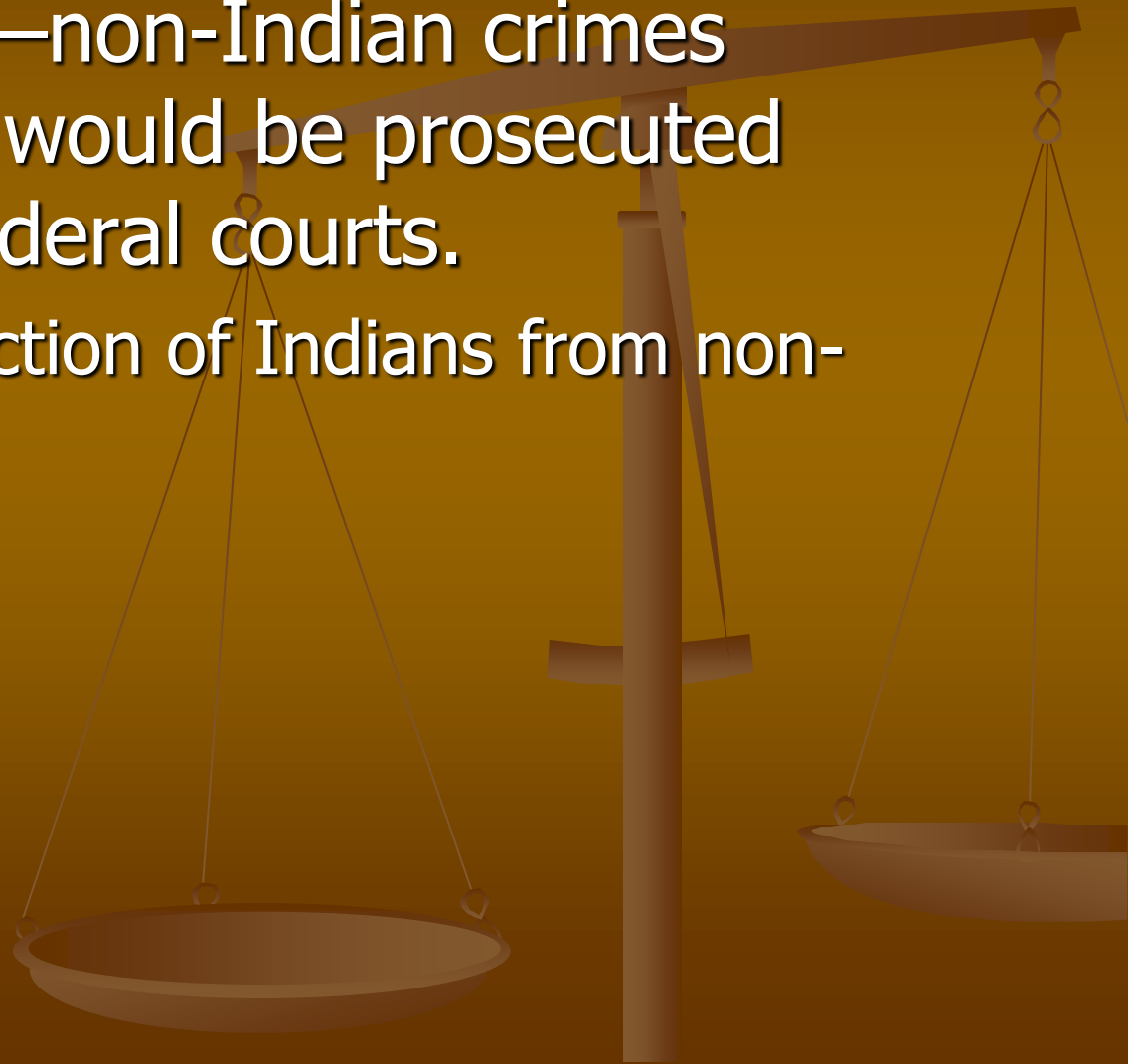
Indian Country Jurisdiction Outside of California

- There are 3 governments who may have jurisdiction in Indian Country—federal, state, and tribe
- Jurisdiction is defined by court decisions (case law) and federal statute
- Determining factor is **WHO ARE THE PARTIES**



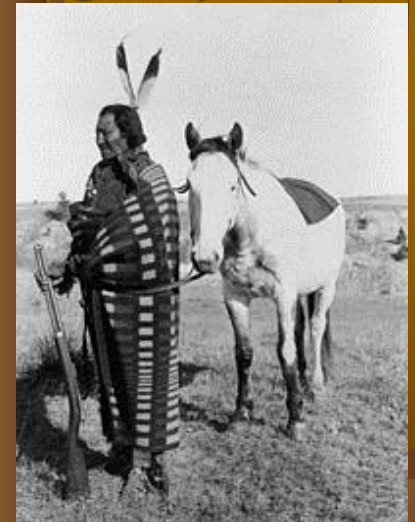
Indian Country Crimes Act (aka General Crimes Act)

- Passed in 1817—non-Indian crimes against Indians would be prosecuted exclusively in federal courts.
 - Notion of protection of Indians from non-Indians



1883 “Major Crimes Act”

- *In Parte Crow Dog*—Sioux man killed another Sioux man on the Brule Sioux reserve. Tribal custom required Crow dog pay Spotted Tails family \$600.00, 8 horses and a blanket.
- Prosecuted by the federal government, found guilty and sentenced to be hanged.
- Appeal to Supreme Court and found there was no federal jurisdiction.



Criminal Jurisdiction Outside California

■ General Crimes

- Non-Indian defendant—exclusive federal
- Indian defendant regardless of victim—concurrent (if minor crime and tribe prosecutes first no federal prosecution)

■ Major Crimes Act

- Major crimes Indian regardless of victim (concurrent)
- But generally federally prosecuted due to tribal sentencing limitations

■ Non-Indian defendant and Non-Indian victim — state (new case federal prosecution)

Civil Jurisdiction For Acts Occurring OUTSIDE California

- **Indian parties —exclusively tribal
- **Non-Indian plaintiff and Indian defendant—
exclusively tribal
- Non-Indian parties --exclusively state
- Indian plaintiff and non-Indian defendant—maybe
tribal, or state or no where.
 - “Montana Test”:
 - the non-Indian consents to tribal jurisdiction; or
 - The non-Indian’s conduct threatens the health, welfare, safety
or political and economic integrity of the Tribe

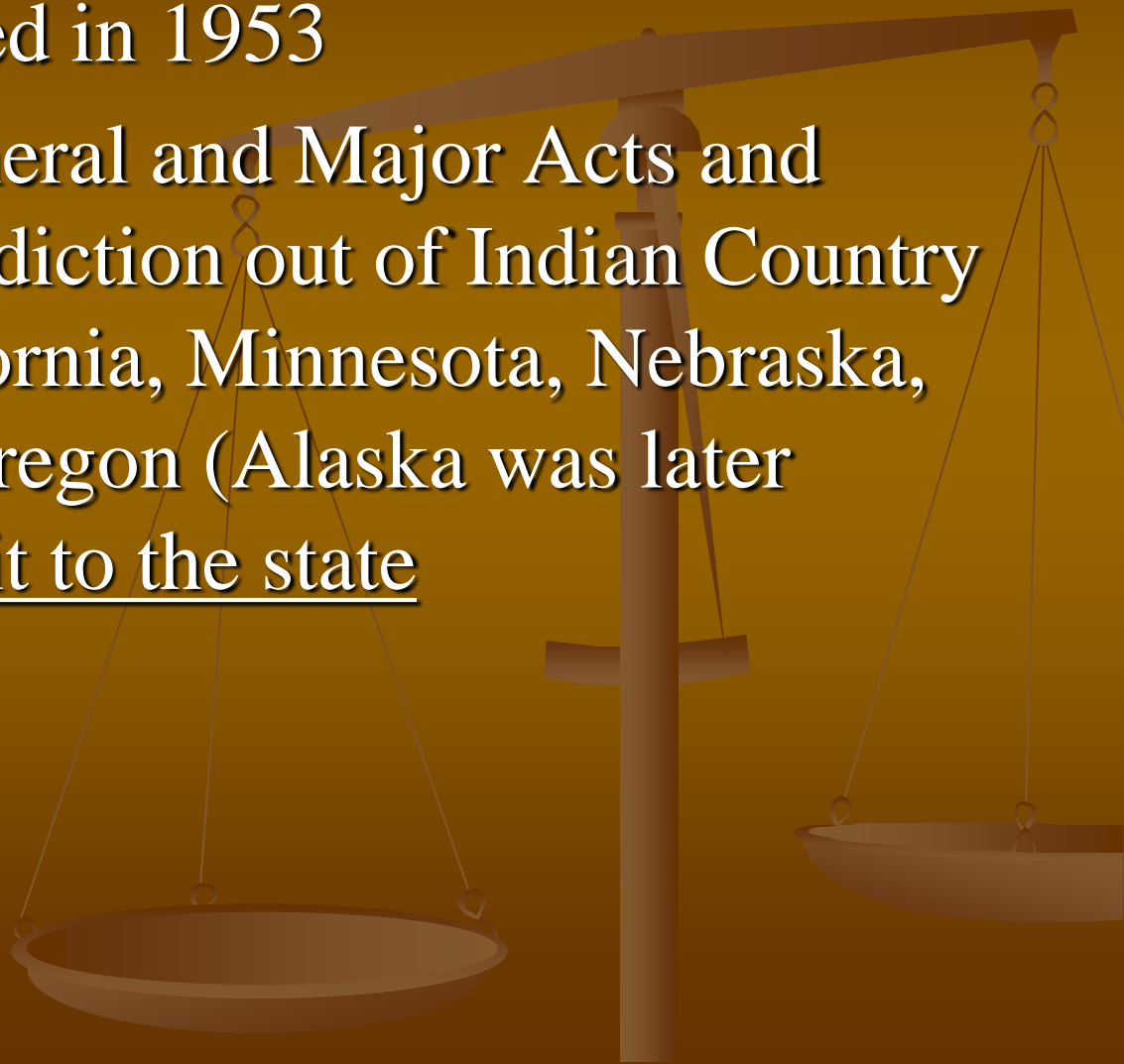
Regulatory Jurisdiction in “Indian Country”

- Tribes have exclusive jurisdiction to regulate Indians conduct unless preempted by federal law in which case it is concurrent.
- Regulating non-Indian conduct (Mushroom Farm Case)
 - “Montana Test”:
 - the non-Indian consents to tribal jurisdiction; or
 - The non-Indian’s conduct threatens the health, welfare, safety or political and economic integrity of the Tribe



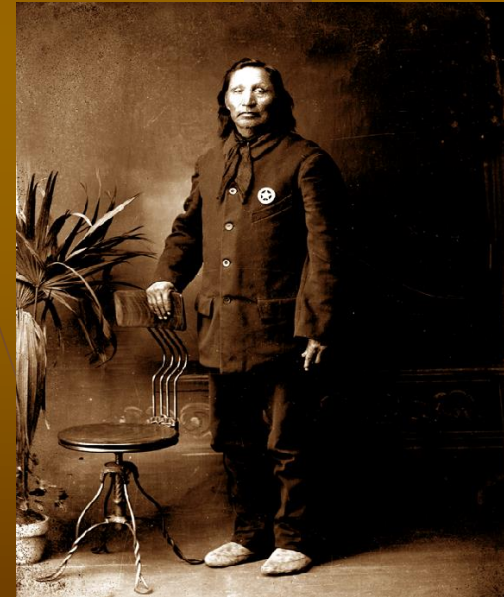
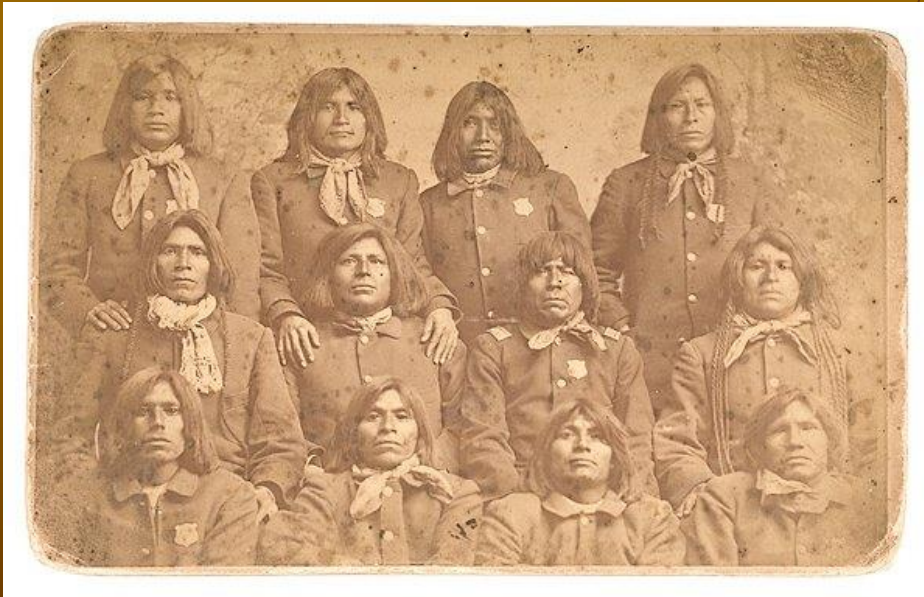
Then Comes PL 280

- Federal law passed in 1953
- Took federal General and Major Acts and limited civil jurisdiction out of Indian Country in 5 states--California, Minnesota, Nebraska, Wisconsin and Oregon (Alaska was later added) and gave it to the state



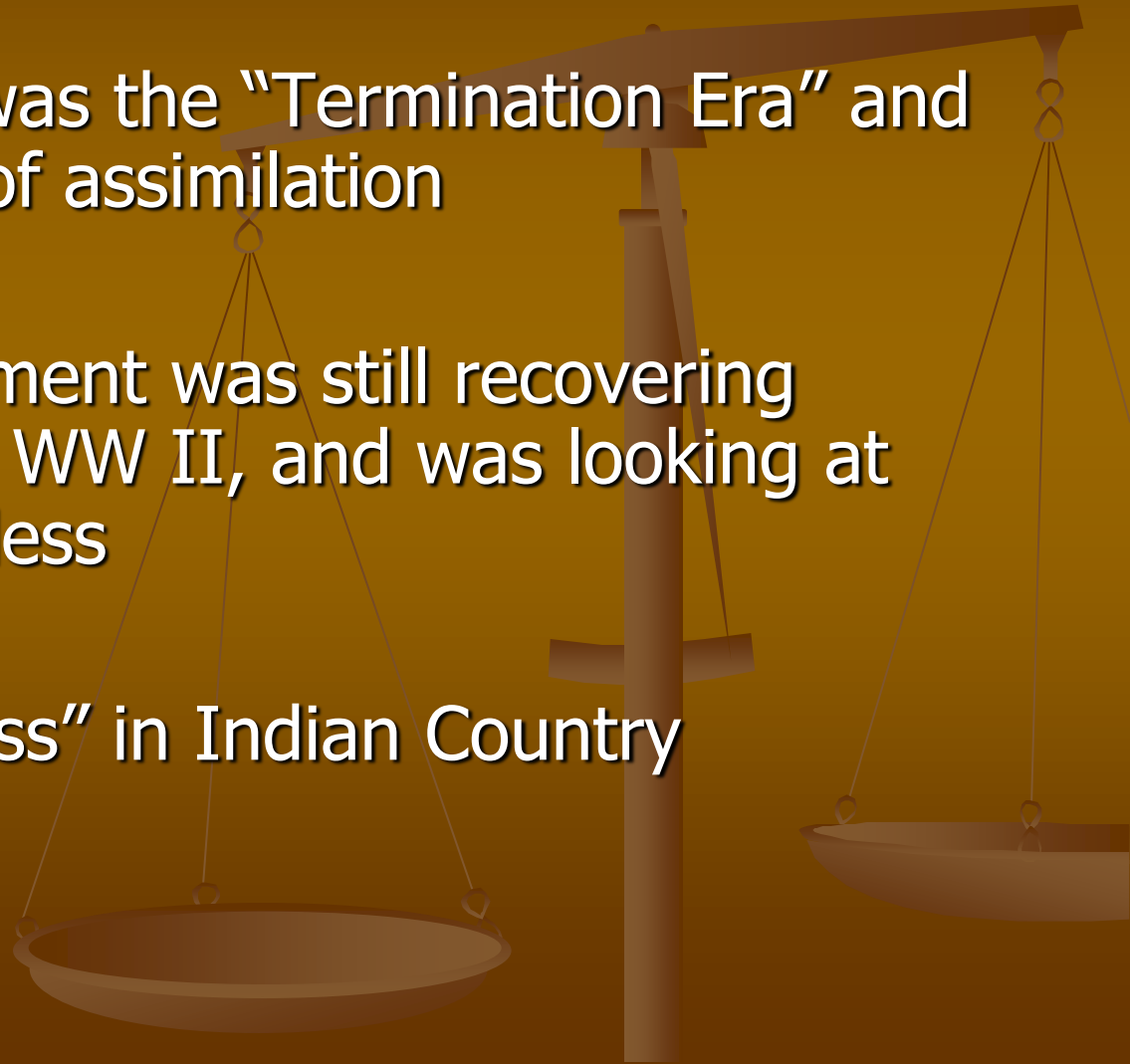
Public Law 280

- Jurisdictional provision
- Frequently misunderstood by the local governments, state, and tribes.



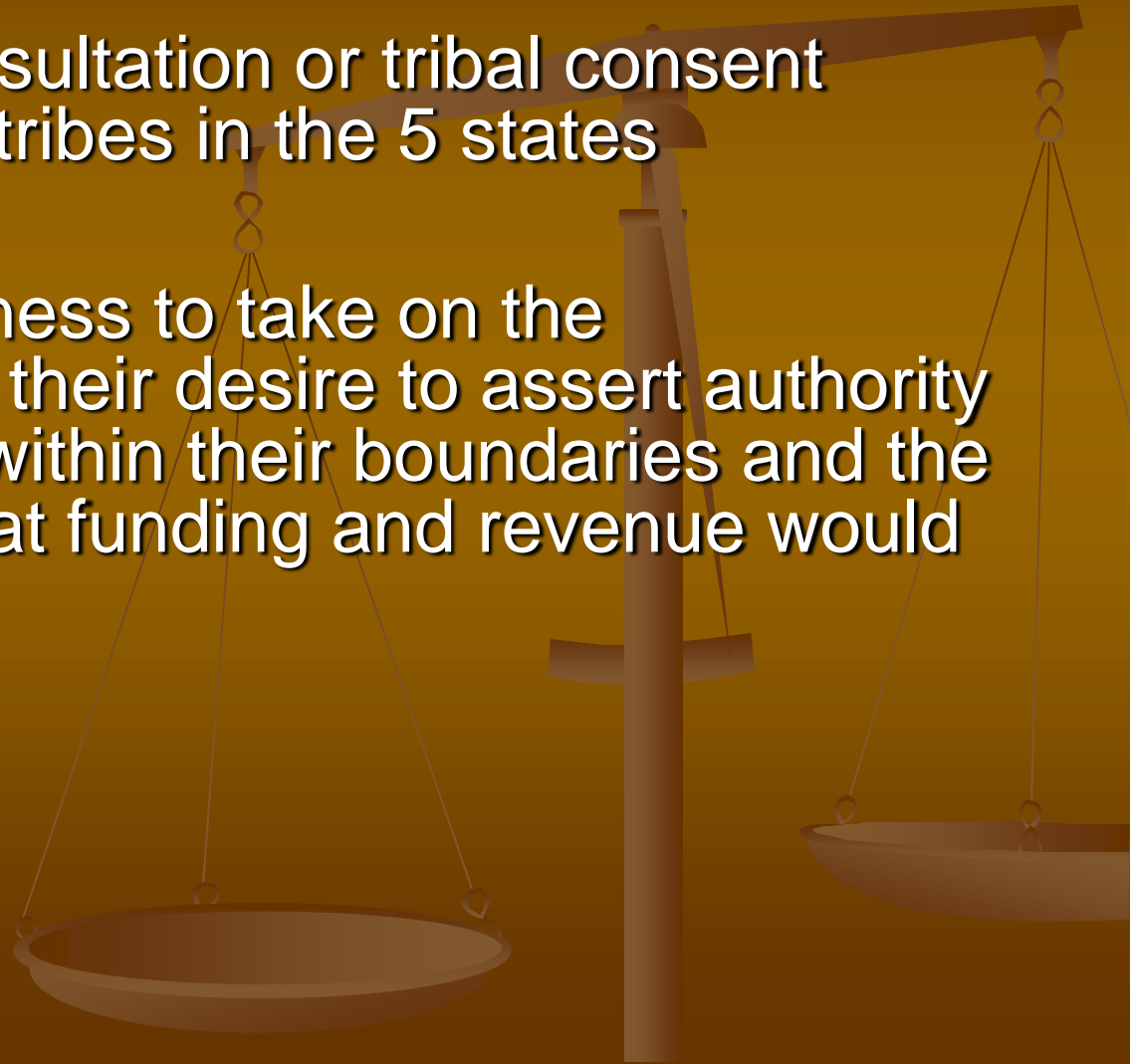
Why PL 280

- Federal Policy was the “Termination Era” and the promoting of assimilation
- Federal government was still recovering financially from WW II, and was looking at ways to spend less
- Address “lawness” in Indian Country



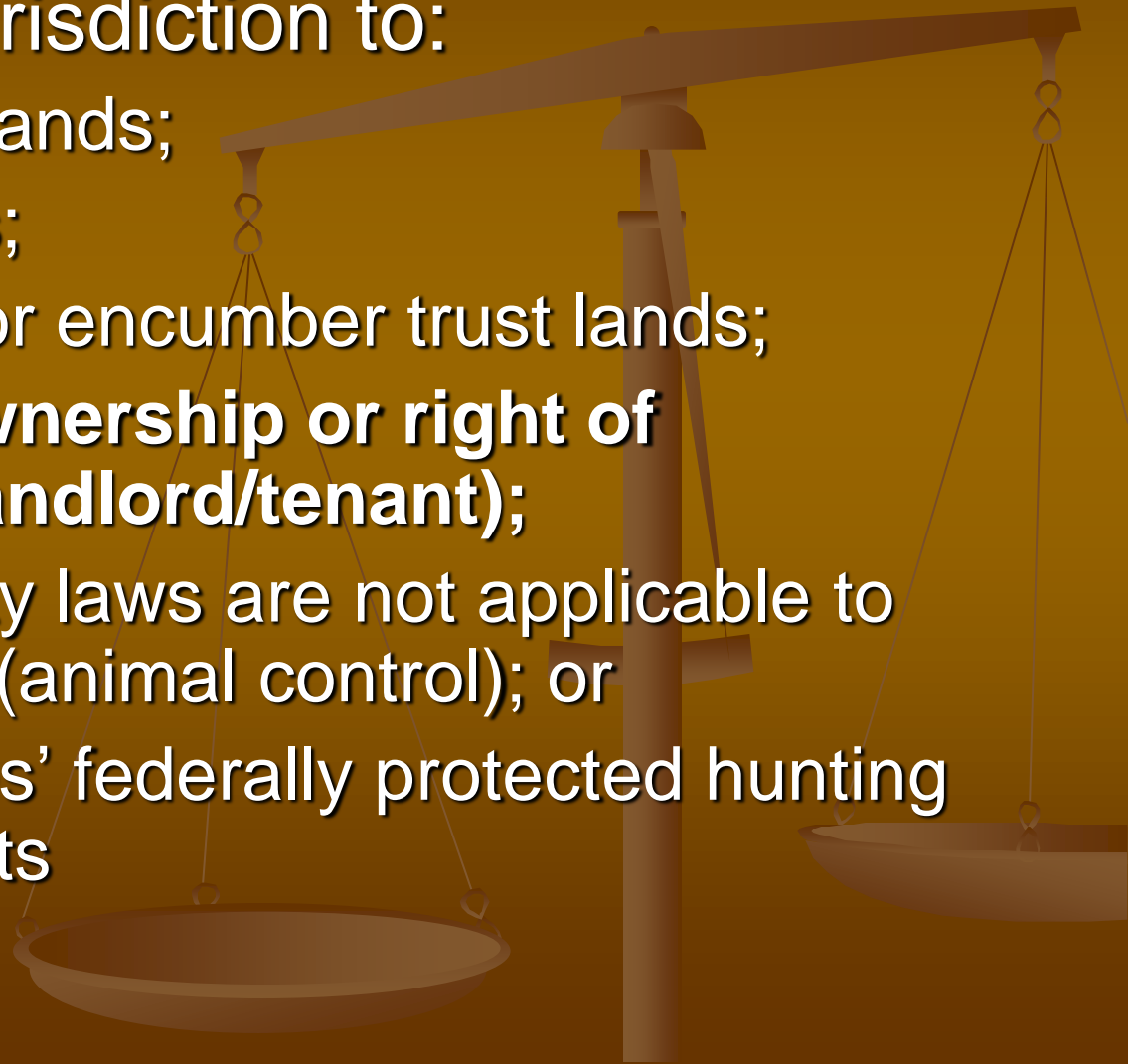
P.L. 280

- There was no consultation or tribal consent required from the tribes in the 5 states
- The states willingness to take on the responsibility was their desire to assert authority over a sovereign within their boundaries and the mistaken belief that funding and revenue would follow



Express Exceptions To The Grant of State Concurrent Jurisdiction

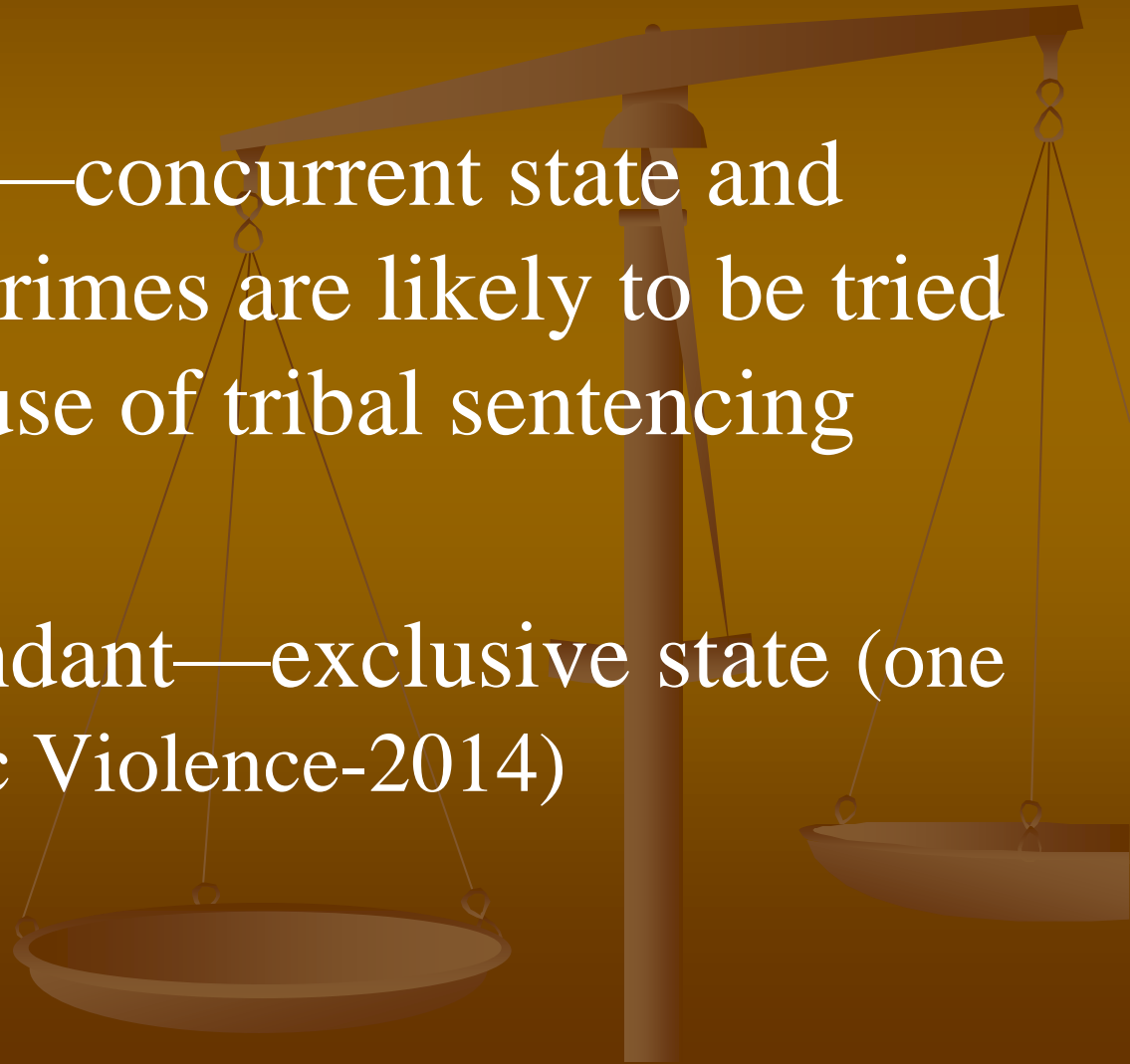
- State has no jurisdiction to:
 - probate trust lands;
 - tax trust lands;
 - regulate use or encumber trust lands;
 - determine ownership or right of possession (landlord/tenant);**
 - county and city laws are not applicable to Indian Country (animal control); or
 - abrogate tribes' federally protected hunting and fishing rights



So What Does Criminal Jurisdiction Look Like in California?

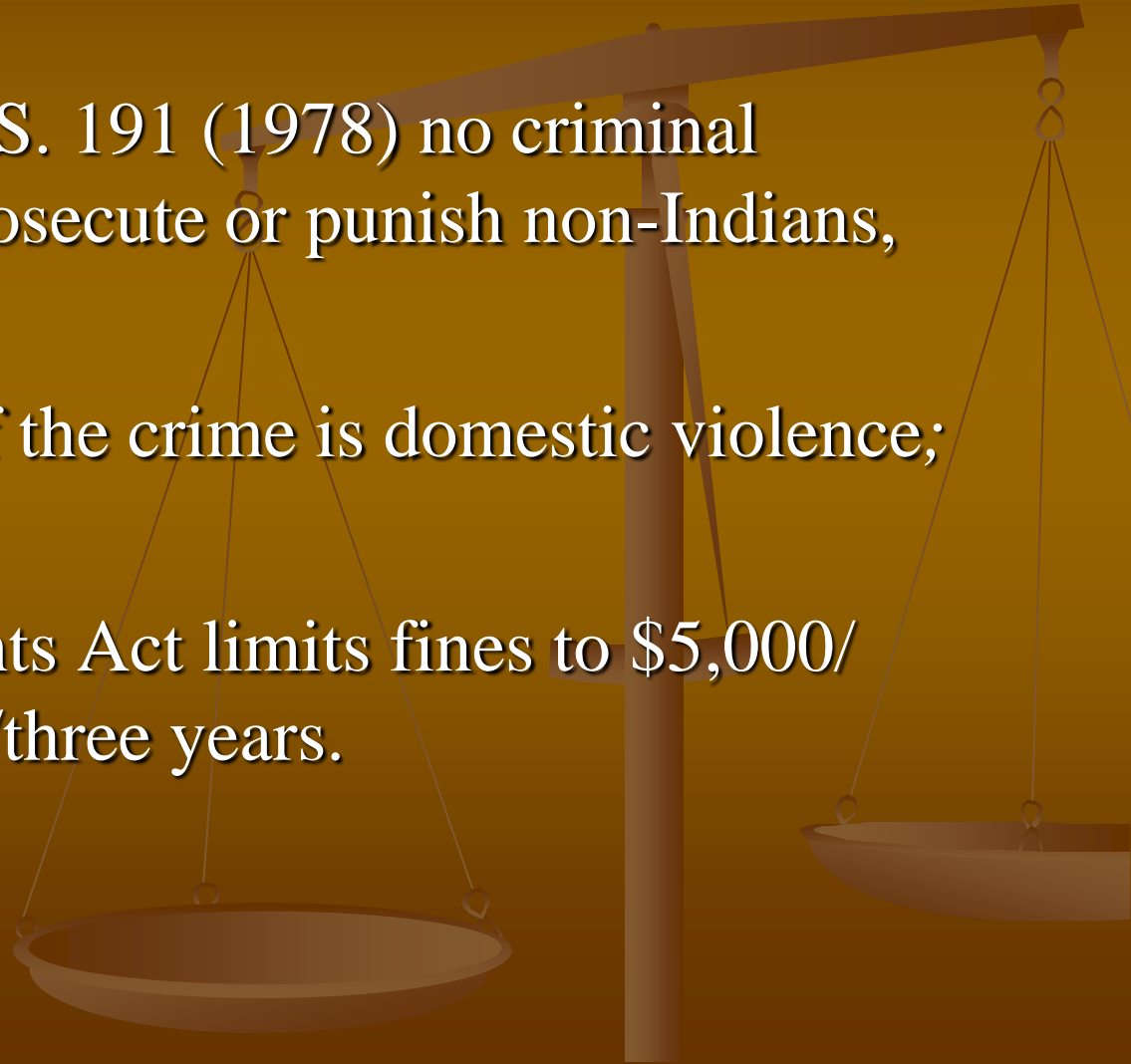
Indian defendant—concurrent state and tribe (but major crimes are likely to be tried by the state because of tribal sentencing limitations)

Non-Indian defendant—exclusive state (one exception Domestic Violence-2014)



Tribal Criminal Jurisdictions Limits

- *Oliphant* 435 U.S. 191 (1978) no criminal jurisdiction to prosecute or punish non-Indians,
- New exception if the crime is domestic violence;
- Indian Civil Rights Act limits fines to \$5,000/
\$15,000 and one/three years.



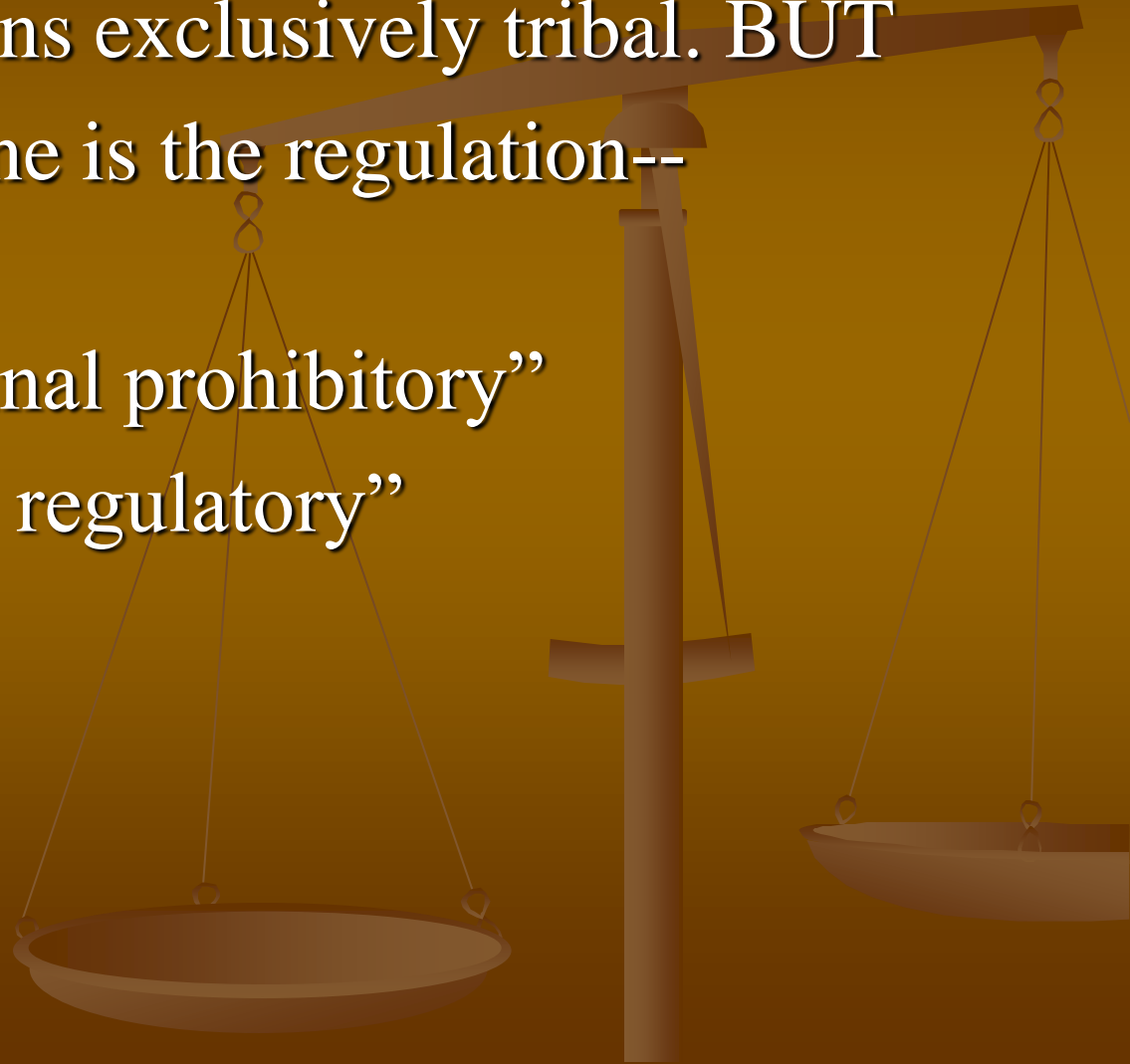
So What Does Civil Jurisdiction Look Like in California?

- PL 280 changed allowing state and the tribe have concurrent civil jurisdiction over civil cases in Indian Country over:
 - Indian parties
 - Non-Indian plaintiff and Indian defendant
- No change over non-Indian parties—exclusively state
- No change Indian suing a non-Indian in tribal court same limitations are in non-PL 280:
 - “Montana Test”---consent and/or threat to the health, safety, welfare, economic integrity of tribe

What Does Regulatory Jurisdiction Look Like in California?

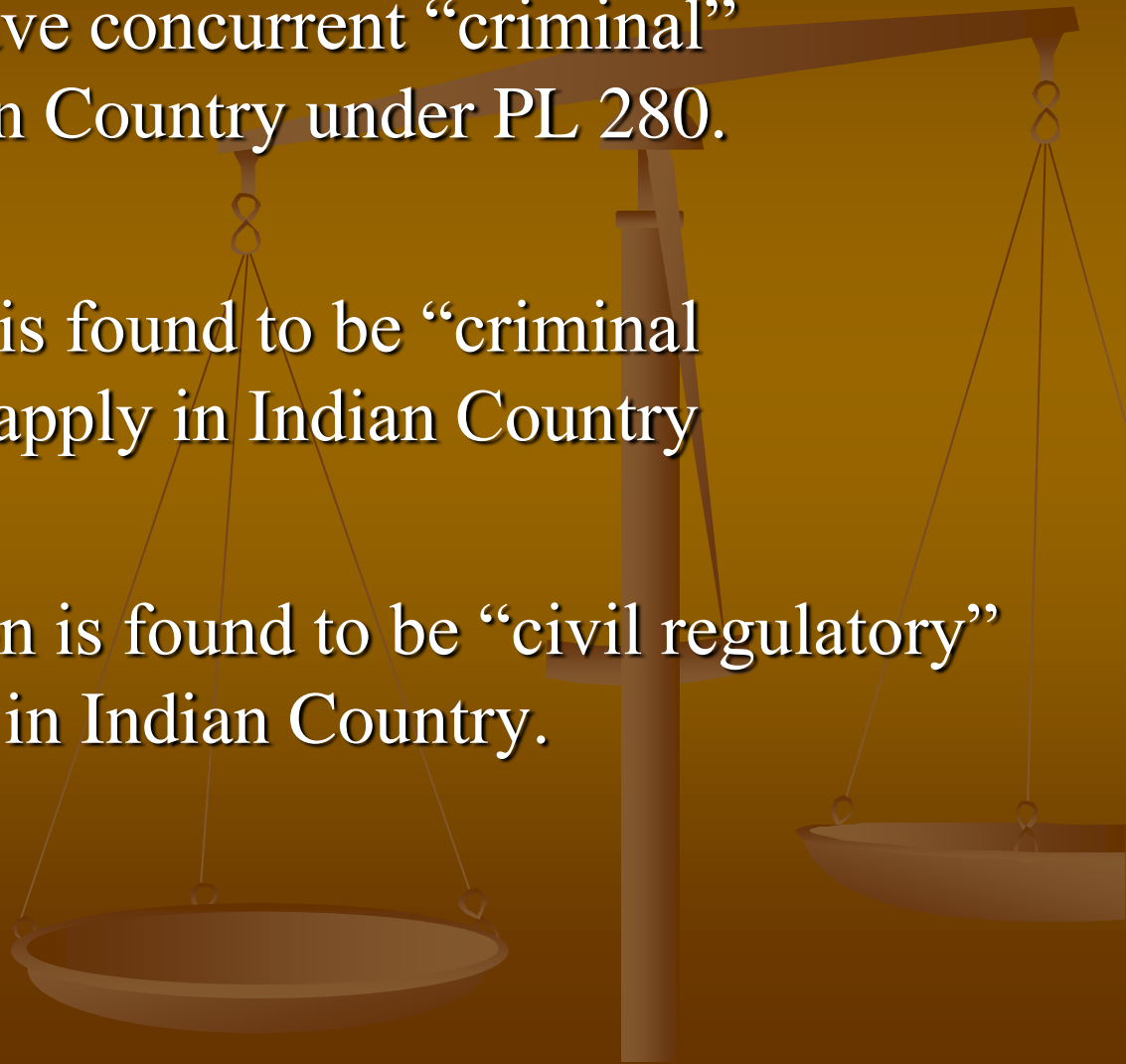
- Regulatory remains exclusively tribal. BUT
Must determine is the regulation--

- “criminal prohibitory”
- “civil regulatory”



Why Does it Matter?

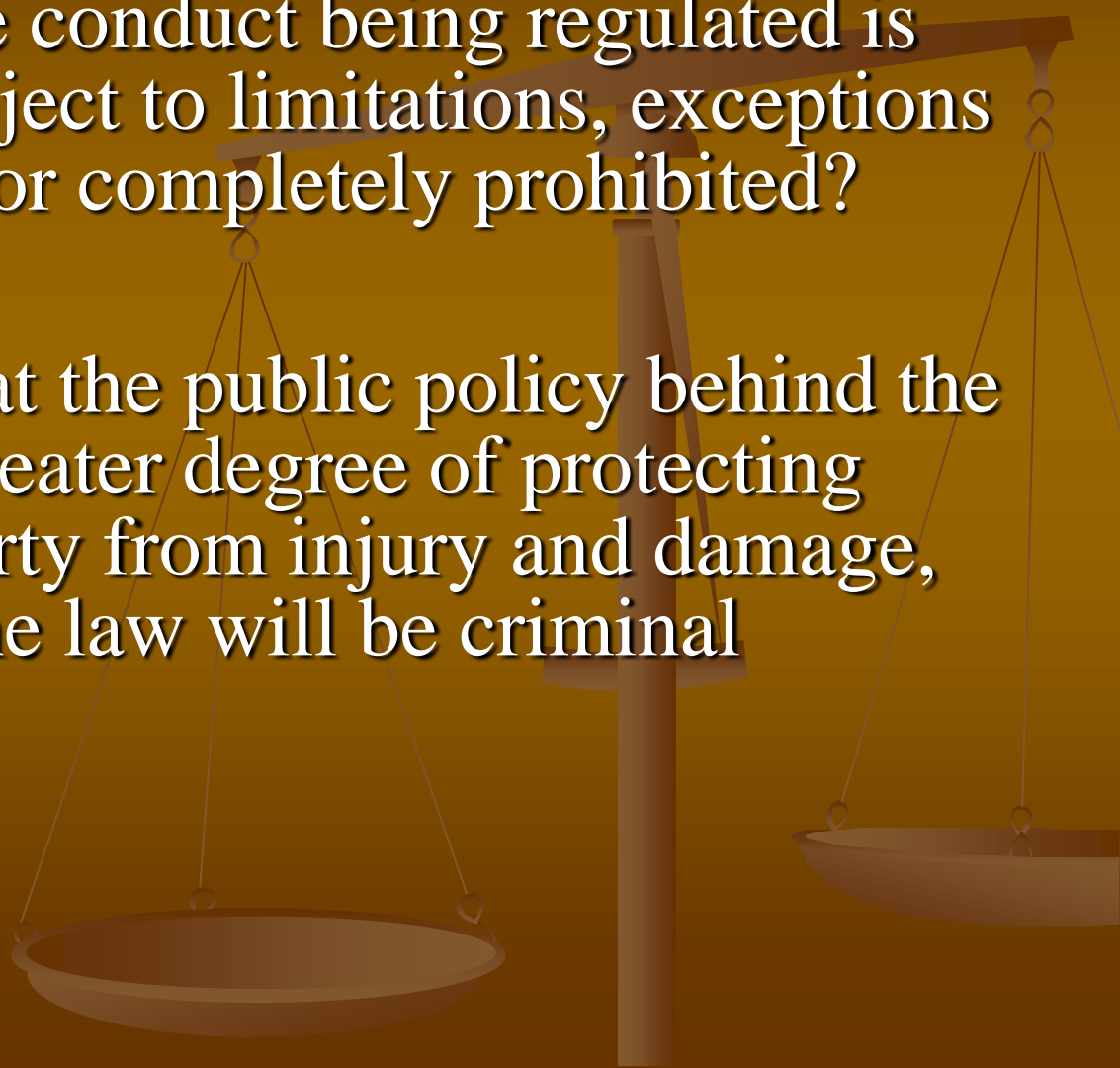
- Remember states have concurrent “criminal” jurisdiction in Indian Country under PL 280.
- If a state regulation is found to be “criminal prohibitory” it can apply in Indian Country
- If the state regulation is found to be “civil regulatory” it cannot be applied in Indian Country.



How Do You Tell Them Apart?

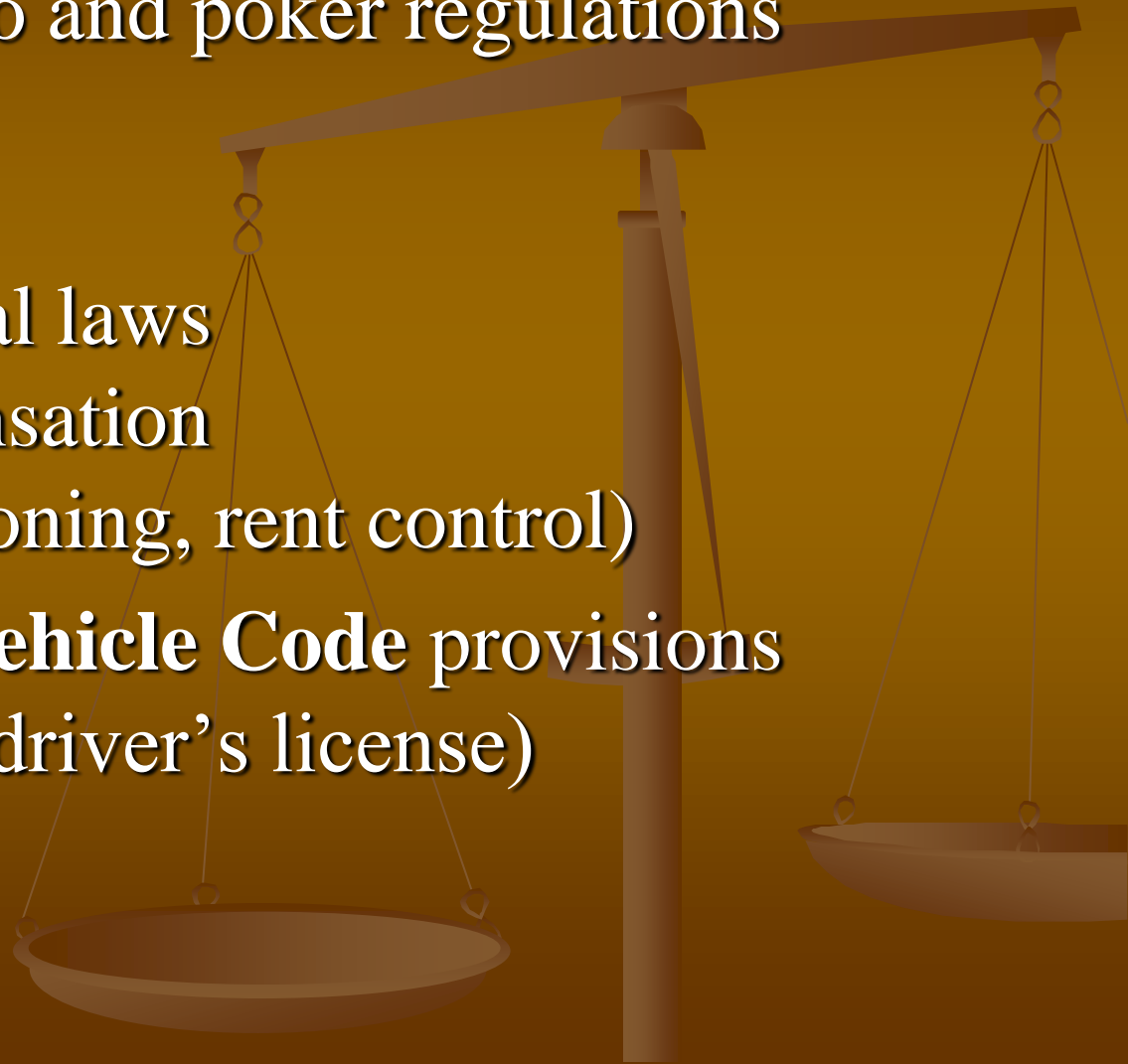
(1) Ask whether the conduct being regulated is permitted but subject to limitations, exceptions or exemptions -- or completely prohibited?

(2) Always look at the public policy behind the state law -- the greater degree of protecting people and property from injury and damage, the more likely the law will be criminal prohibitory.



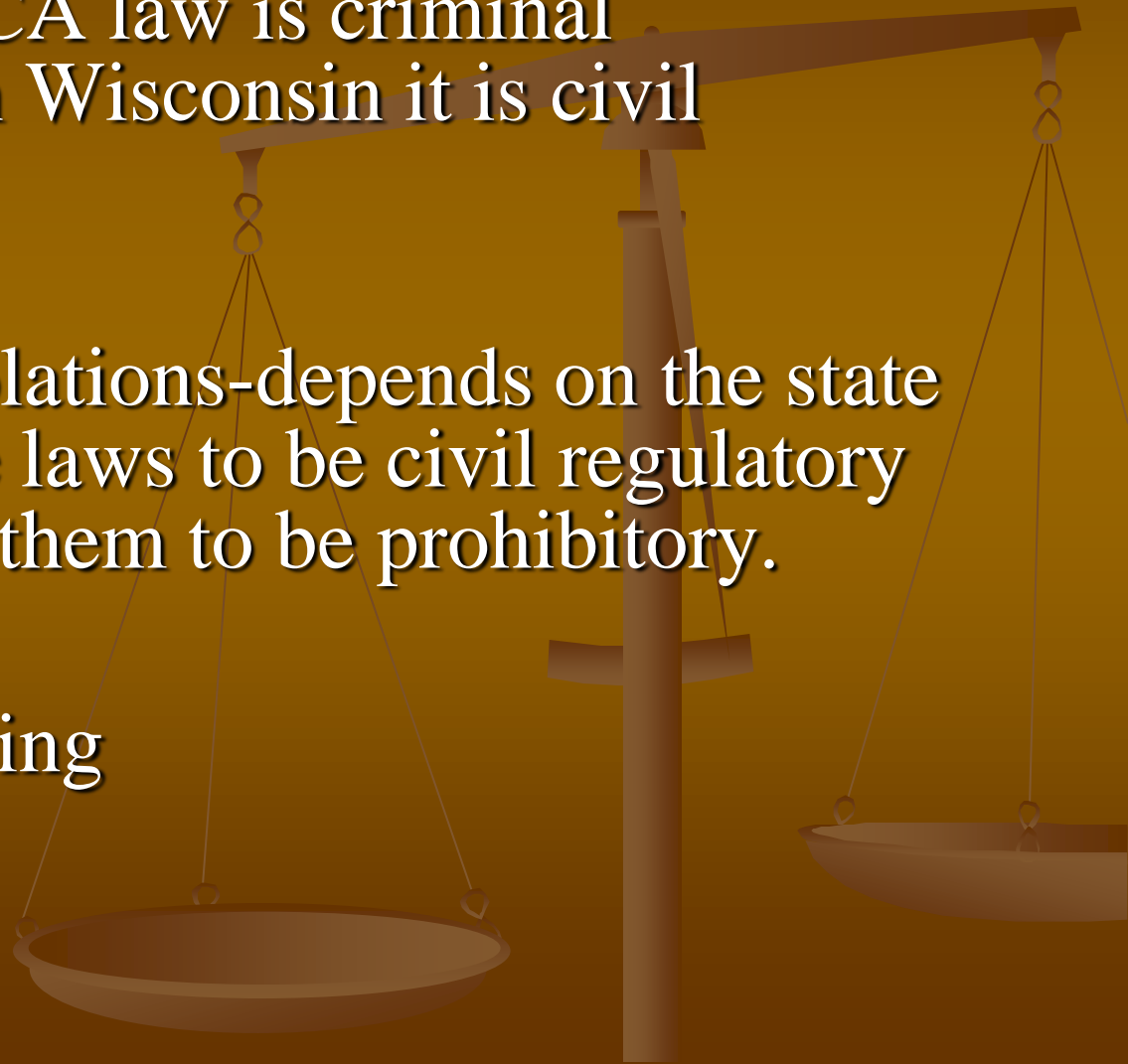
Examples of State Civil Regulatory Jurisdiction

- High-stakes bingo and poker regulations
- CA boxing laws
- CA Labor Laws
- CA environmental laws
- Workers Compensation
- Land use laws (zoning, rent control)
- Certain **Motor Vehicle Code** provisions (registration and driver's license)
- Fire Codes



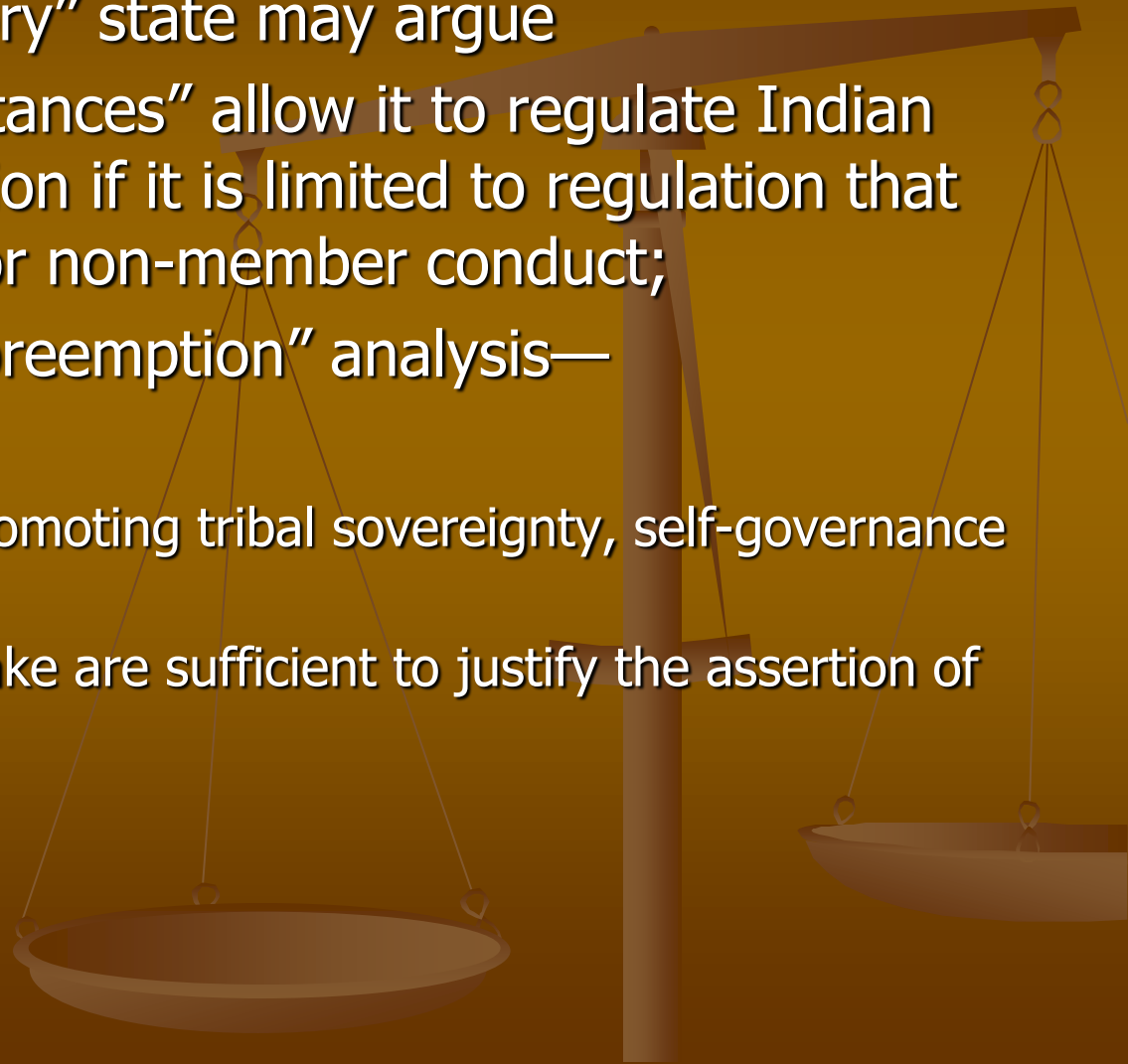
Conflicting Decisions

- Fireworks — In CA law is criminal prohibitory but in Wisconsin it is civil regulatory
- Vehicle Code violations—depends on the state some found these laws to be civil regulatory and others found them to be prohibitory.
- Hunting and Fishing



Exception to the Rule

- Even if “civil regulatory” state may argue
- “Exceptional circumstances” allow it to regulate Indian activities on reservation if it is limited to regulation that reaches non-Indian or non-member conduct;
- Courts will apply a “preemption” analysis—
- Balancing of the:
 - federal interests in promoting tribal sovereignty, self-governance and autonomy and
 - state’s interests at stake are sufficient to justify the assertion of state authority.

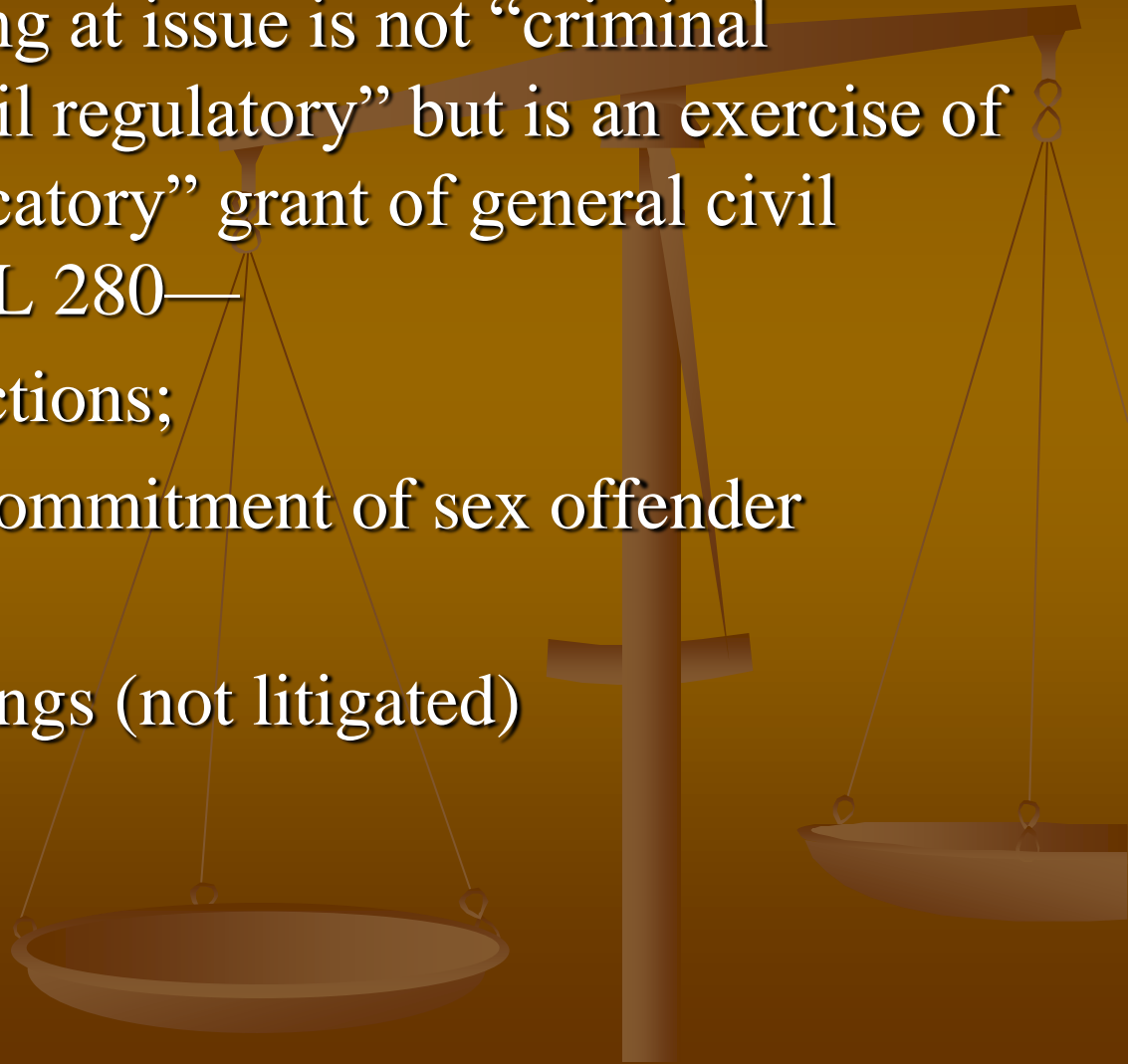


Exception to the Rule

- Minnesota—civil traffic laws (found to be civil regulatory) still apply to non-member Indians on sister reservation
- CA Tax and Revenue Code-Indian smokeshop retailer liable for failure to collect sales/excise tax on non-Indian purchases;
- CA Health and Safety Code—Cigarette Fire Safety and Firefighter Protection (burning paper);
- CA Tax and Revenue Code--selling cigarette brands that are not on the state Tobacco Directory;
- Liqueur;

Another Exception to Rule

- State civil proceeding at issue is not “criminal prohibitory” or “civil regulatory” but is an exercise of state’s “civil adjudicatory” grant of general civil jurisdiction under PL 280—
- State dependency actions;
- MN—involuntary commitment of sex offender proceedings
- State 5150 proceedings (not litigated)

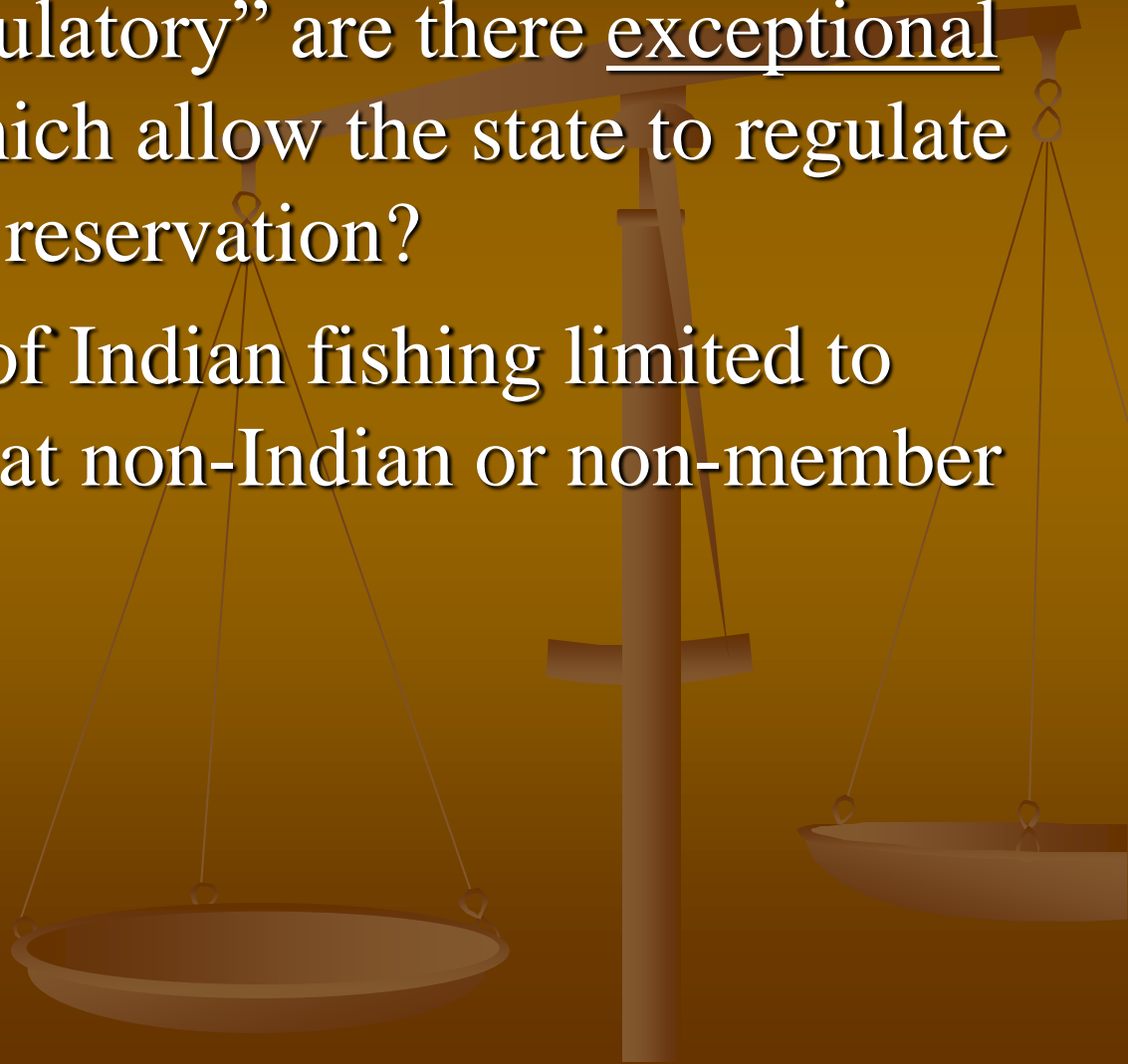


Let's Apply the Test

- California Fish and Game Code-cited for gill net and taking of fish while on allotment
 - Is the conduct (fishing) permitted subject to limitations, exceptions or exemption or completely prohibited?
 - What is the “public policy” being protected—degree that people and property are being protected from injury or damage?

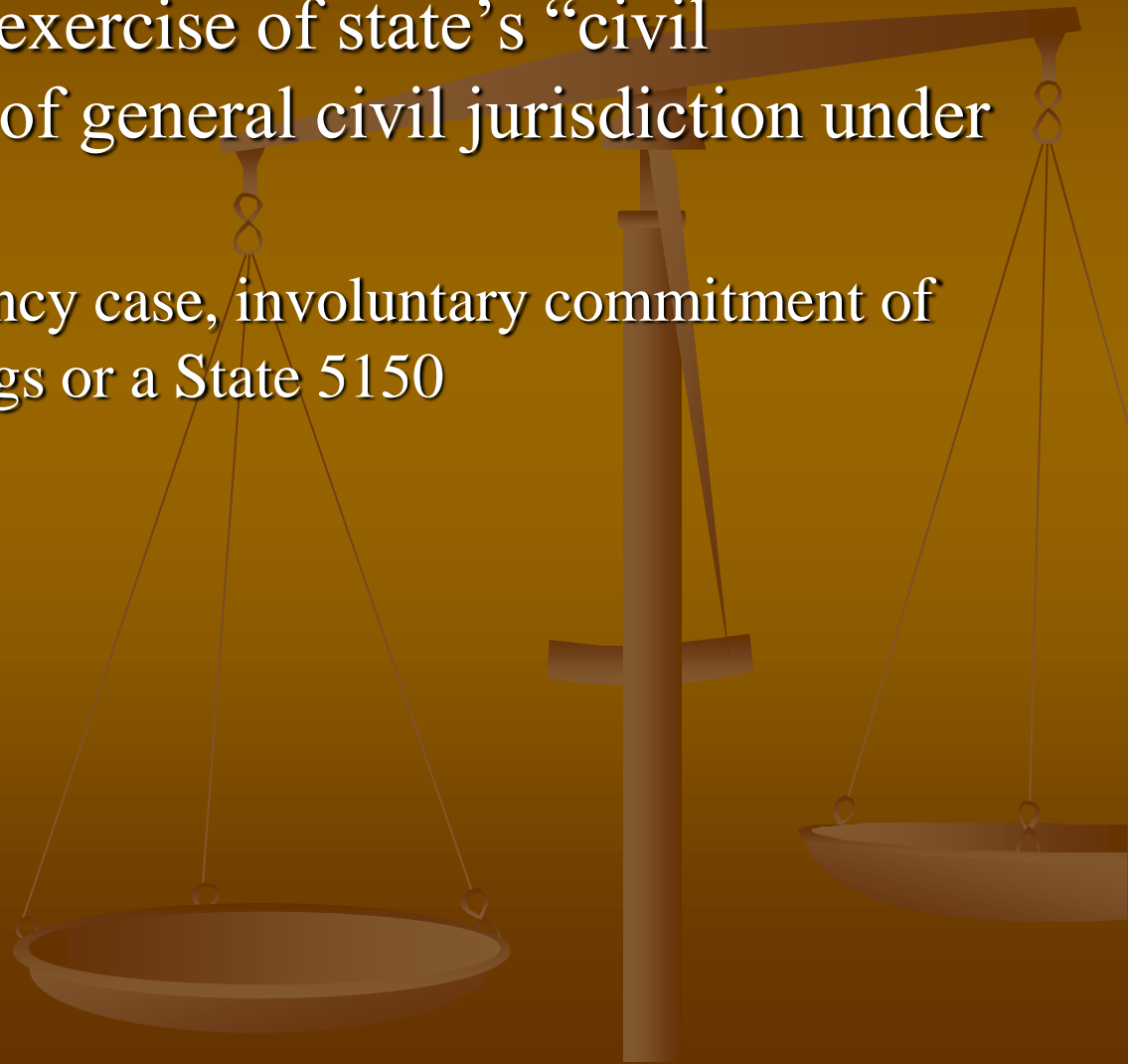
Do Any of the Exceptions Apply?

- Even if “civil regulatory” are there exceptional circumstances which allow the state to regulate Indian fishing on reservation?
- Is the regulation of Indian fishing limited to regulation aimed at non-Indian or non-member conduct?



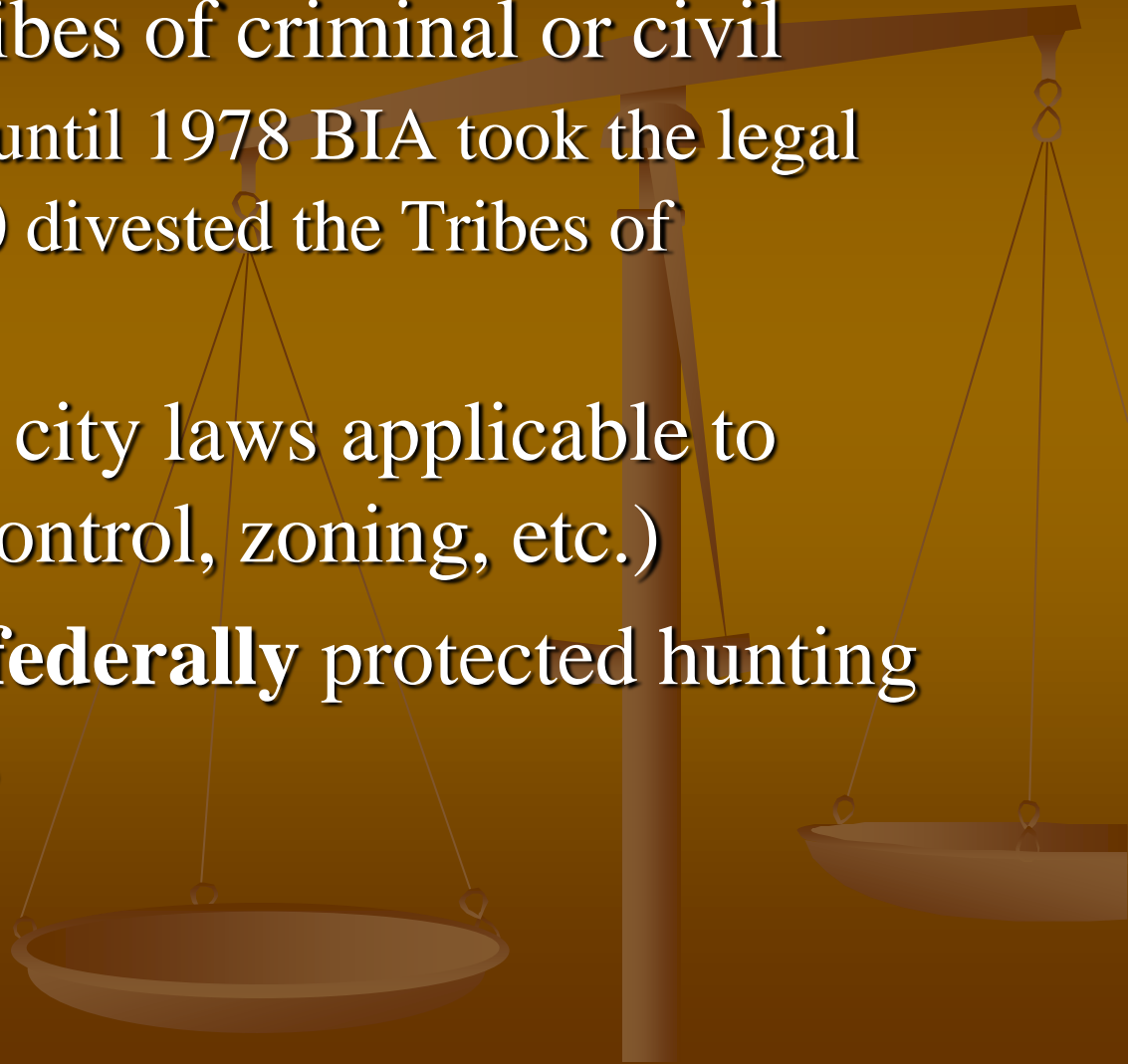
Do Any of the Exceptions Apply?

- Is the regulation an exercise of state's "civil adjudicatory" grant of general civil jurisdiction under PL 280?
- Not similar to dependency case, involuntary commitment of sex offender proceedings or a State 5150



What P.L. 280 Didn't Do...

- Did not divest Tribes of criminal or civil jurisdiction. (Up until 1978 BIA took the legal position that PL 280 divested the Tribes of jurisdiction)
- Make county and city laws applicable to Indians (animal control, zoning, etc.)
- Abrogate tribes' **federally** protected hunting and fishing rights

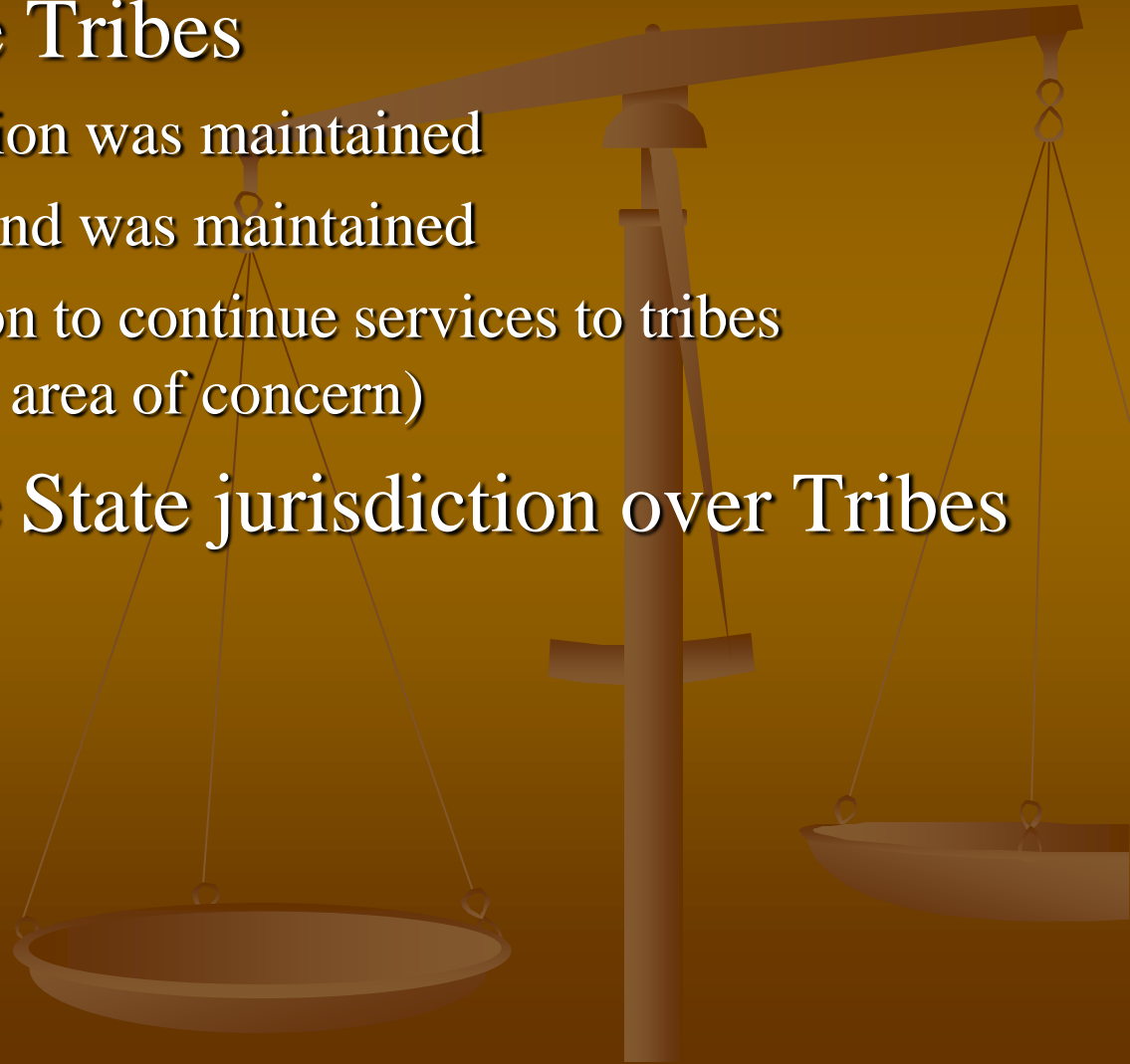


What P.L. 280 Didn't Do...

■ Did not terminate Tribes

- Federal recognition was maintained
- Trust status of land was maintained
- Federal obligation to continue services to tribes remained (major area of concern)

■ Did not authorize State jurisdiction over Tribes



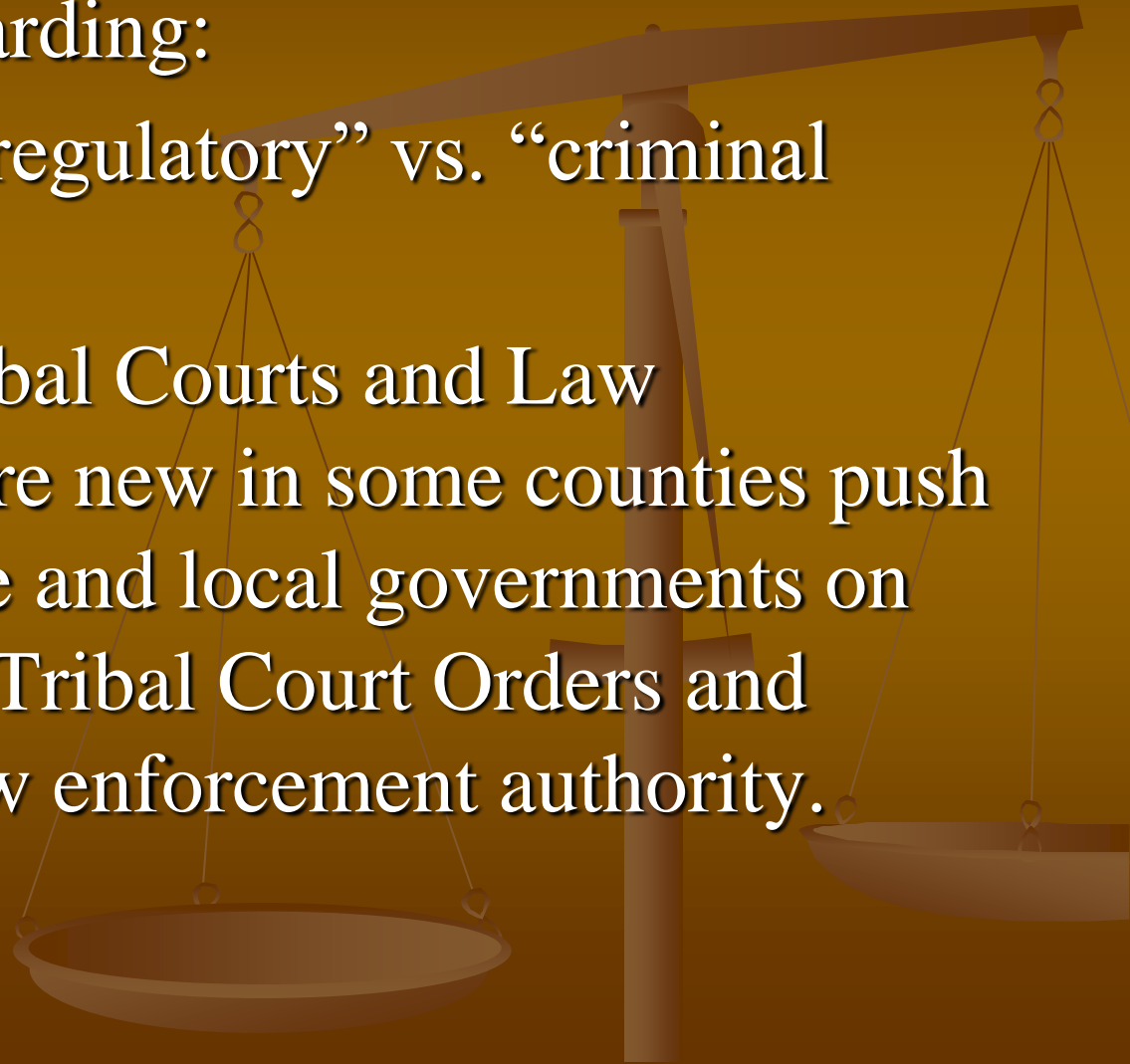
How Has P.L. 280 Impacted Tribes in California?

- **Lack of BIA funding for law enforcement and tribal courts, thus fewer tribal courts and tribal law enforcement being developed.**

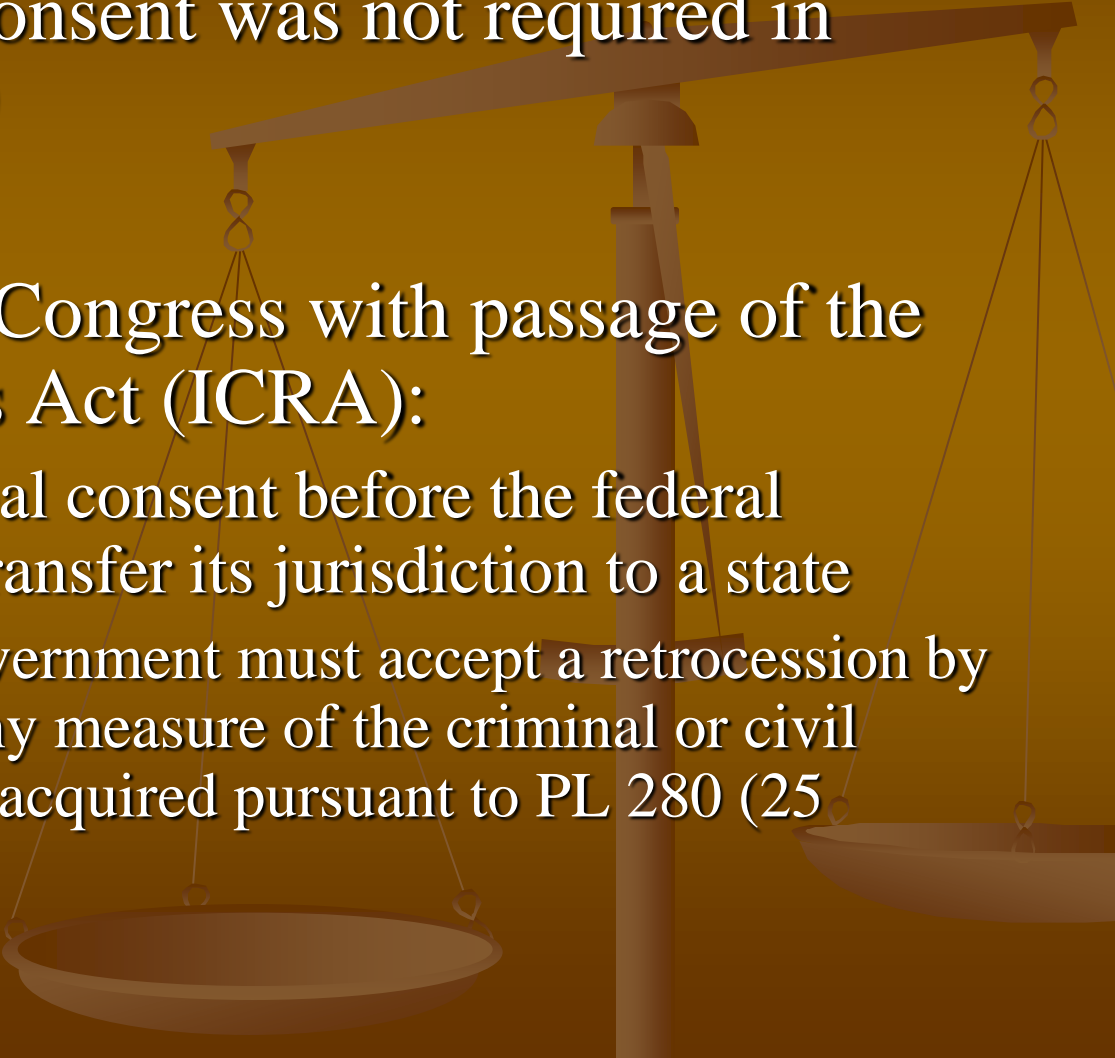


How Has P.L. 280 Impacted Tribes in California?

- Court battles regarding:
 - What is “civil regulatory” vs. “criminal prohibitory”
 - Because of Tribal Courts and Law Enforcement are new in some counties push back from state and local governments on recognition of Tribal Court Orders and authority of law enforcement authority.

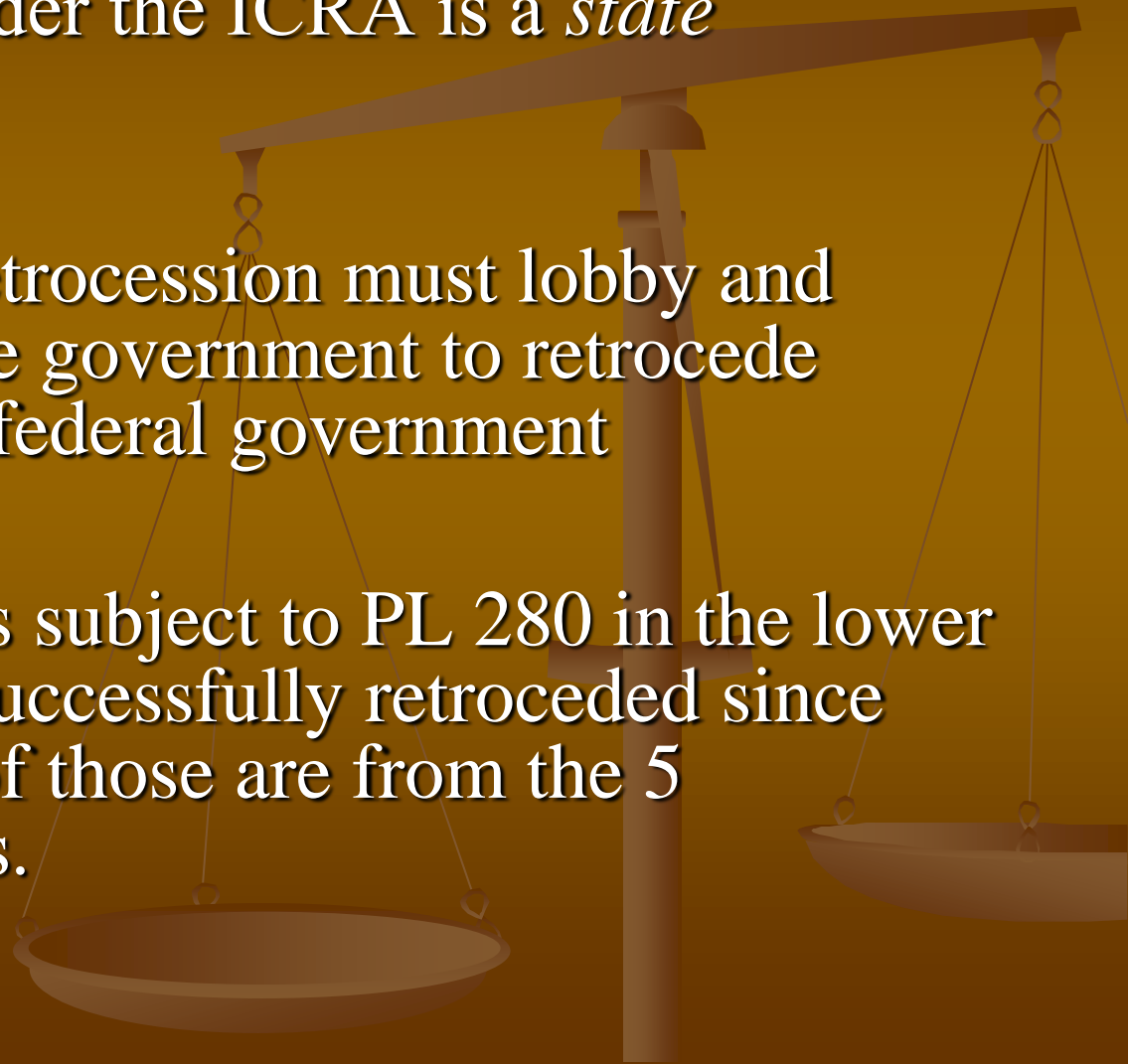


“Retrocession”

- Remember tribal consent was not required in 1953 when PL 280
 - Corrected in 1968 Congress with passage of the Indian Civil Rights Act (ICRA):
 - which requires tribal consent before the federal government may transfer its jurisdiction to a state
 - Also, the federal government must accept a retrocession by any State of all or any measure of the criminal or civil jurisdiction, or both acquired pursuant to PL 280 (25 U.S.C. § 1323)
- 

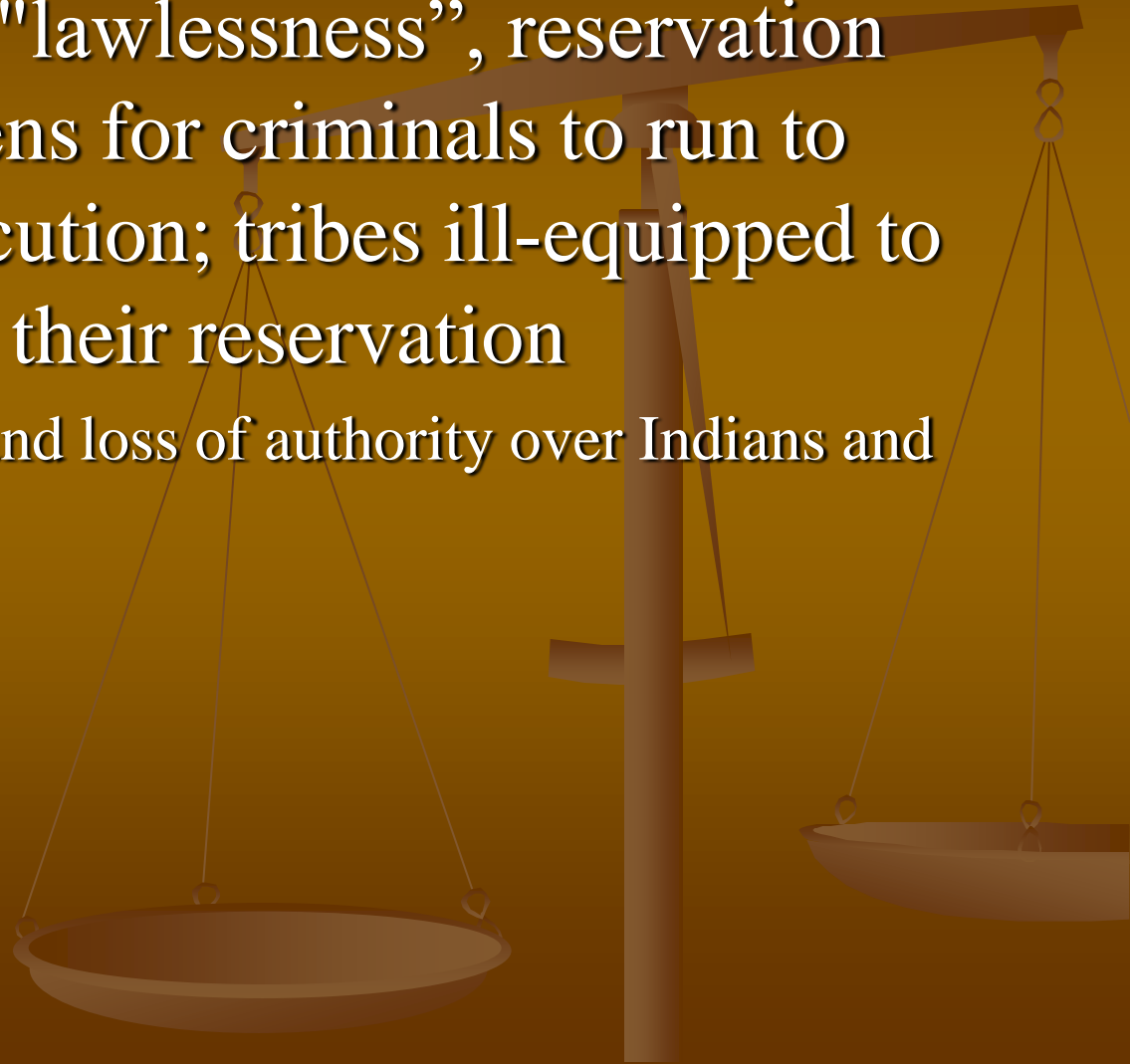
“Retrocession”

- “Retrocession” under the ICRA is a *state* initiated process.
- A Tribe seeking retrocession must lobby and persuade their state government to retrocede jurisdiction to the federal government
- Of over 150 Tribes subject to PL 280 in the lower 48, only 31 have successfully retroceded since 1968, and only 7 of those are from the 5 “mandatory ”states.



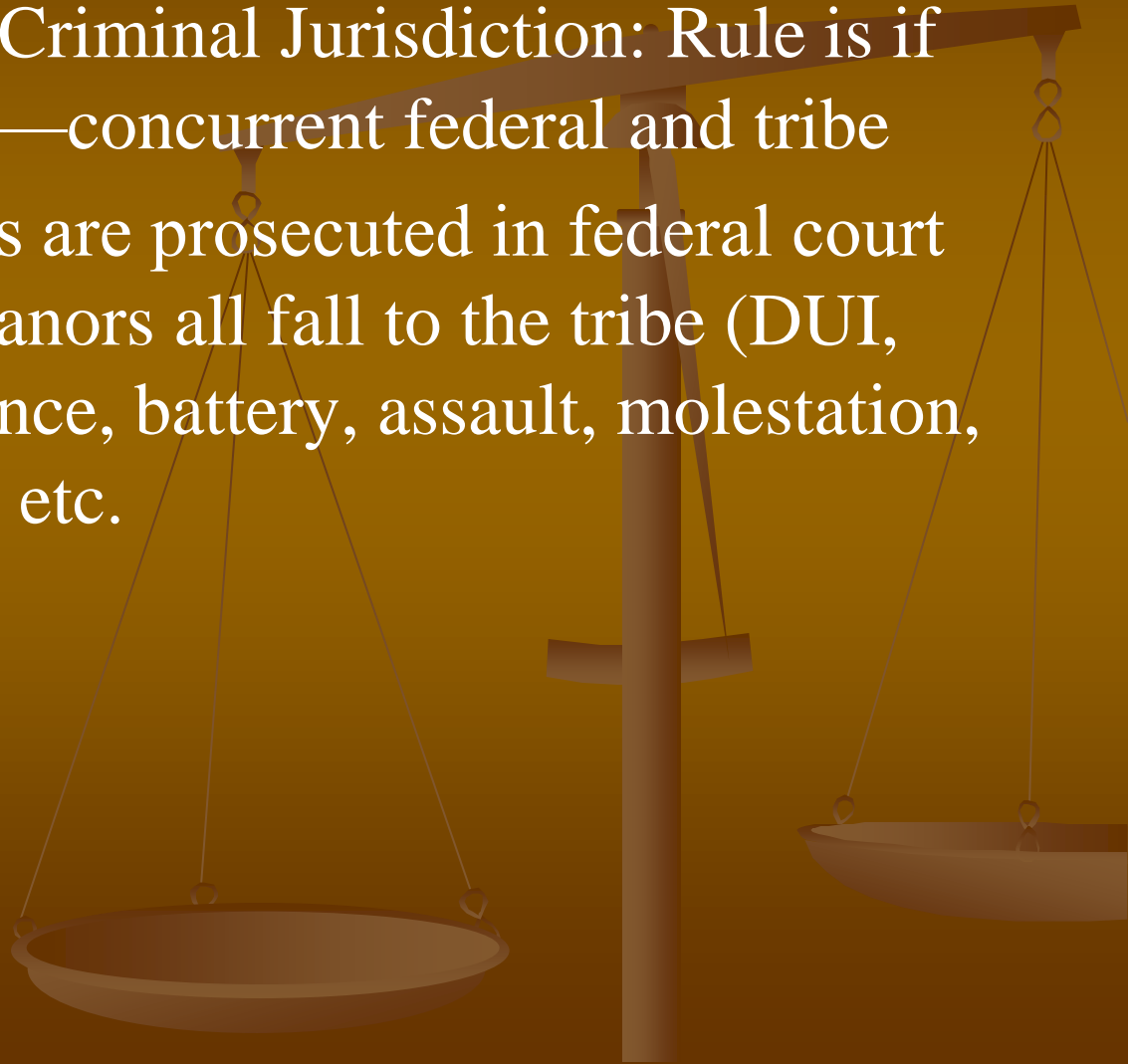
“Retrocession”

- State arguments: “lawlessness”, reservation will become havens for criminals to run to avoid state prosecution; tribes ill-equipped to manage crime on their reservation
 - Power struggle and loss of authority over Indians and Indian Country



“Retrocession”

- Tribal Concerns: Criminal Jurisdiction: Rule is if an Indian defendant—concurrent federal and tribe
“Major” felonies are prosecuted in federal court
BUT misdemeanors all fall to the tribe (DUI, domestic violence, battery, assault, molestation, sex offensives, etc.



“Retrocession”

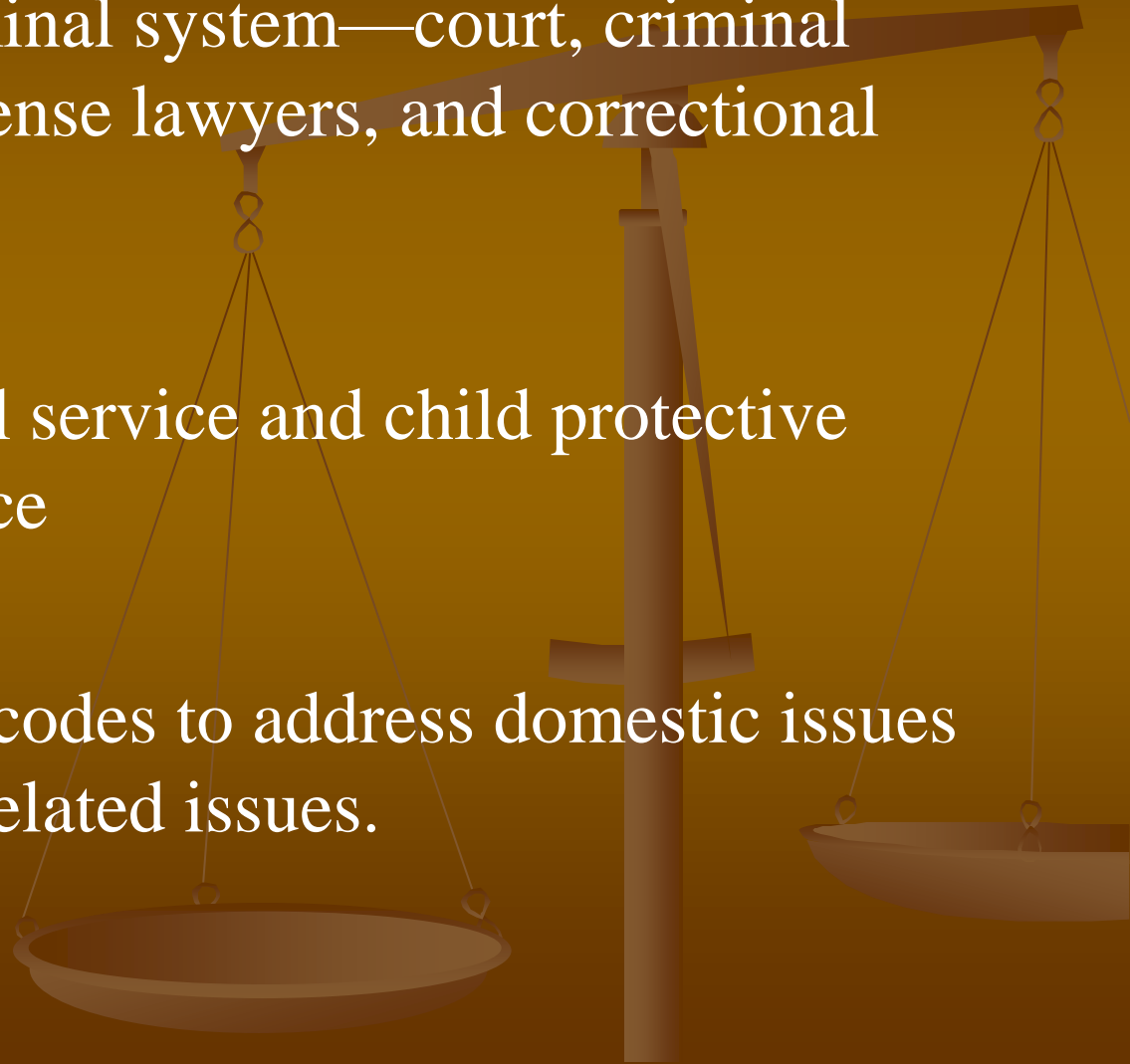
- Tribal Concerns: Civil Jurisdiction: Rule is exclusive jurisdiction for civil matters on the reservation involving tribal members (divorces, guardianships, conservatorships, child custody, child support, contract claims, tort actions, etc.)
- State Civil Adjudicatory Jurisdiction—Tribes will be required to exercise jurisdiction over child abuse cases that occur on the reservation.

“Retrocession”

Must have robust criminal system—court, criminal laws, prosecutors, defense lawyers, and correctional facilities

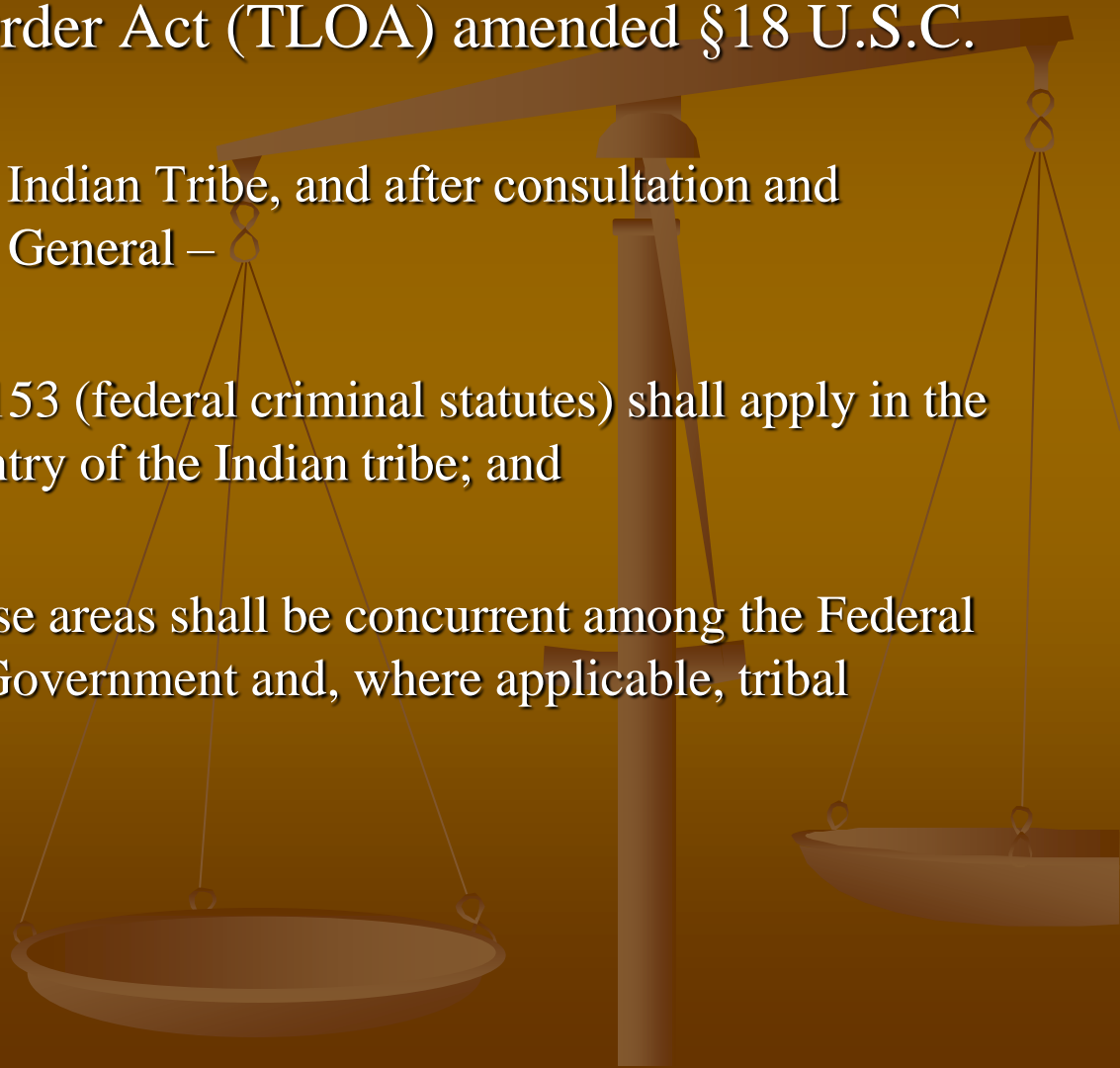
Must have tribal social service and child protective service systems in place

Must have civil tribal codes to address domestic issues and tort and contract related issues.



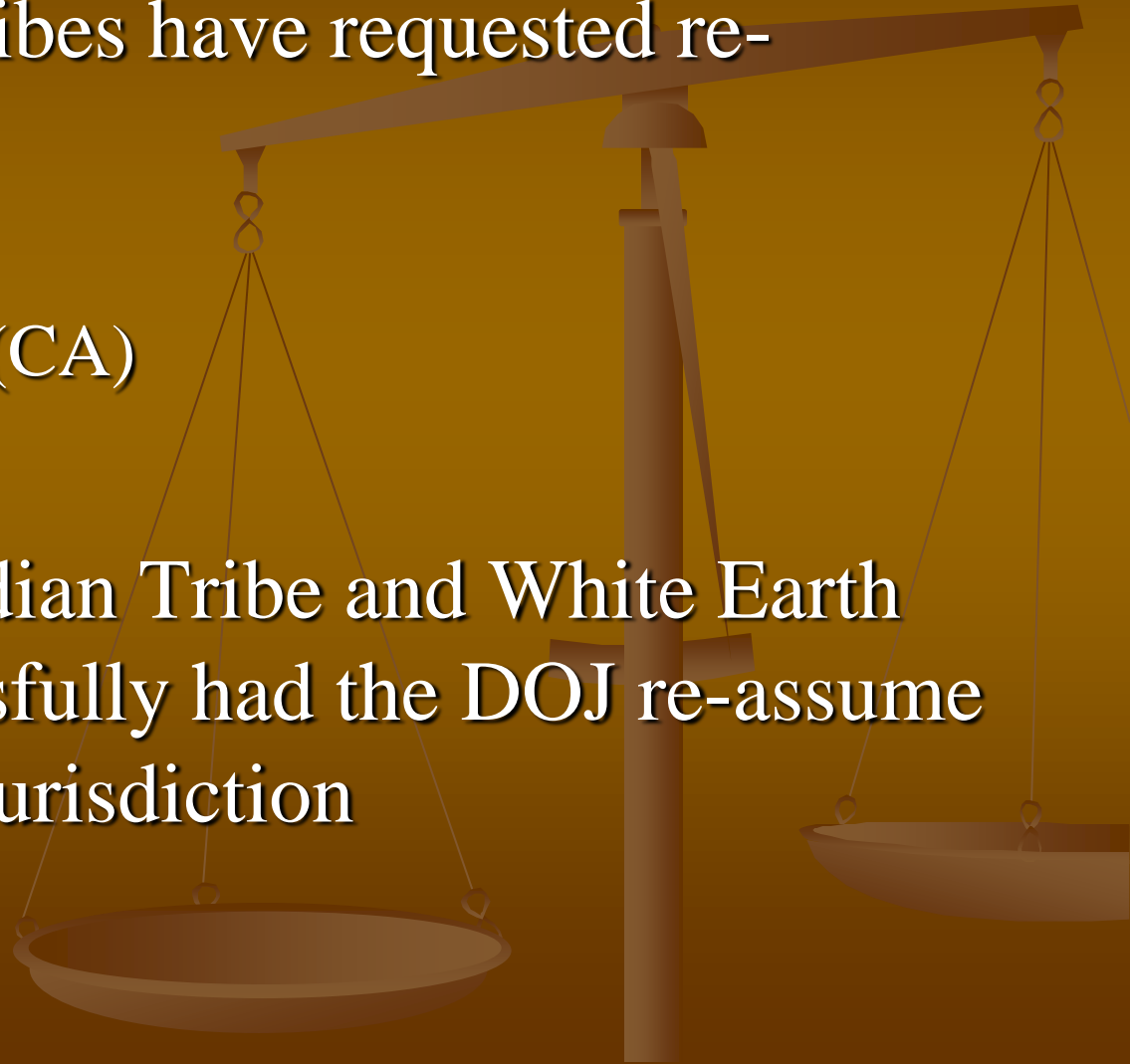
“Re-Assumption”

- 2010 Tribal Law and Order Act (TLOA) amended §18 U.S.C. § 1162 (PL 280)
 - “..., at the request of an Indian Tribe, and after consultation and consent by the Attorney General –
 - (1) sections 1152 and 1153 (federal criminal statutes) shall apply in the areas of the Indian Country of the Indian tribe; and
 - (2) jurisdiction over those areas shall be concurrent among the Federal Government and State Government and, where applicable, tribal government.”



“Re-Assumption”

- The following Tribes have requested re-assumption:
 - Elk Valley (CA)
 - Table Mountain (CA)
- Hoopa Valley Indian Tribe and White Earth (MN) has successfully had the DOJ re-assume federal criminal jurisdiction



In Conclusion

- Tribes have inherent authority to establish their own laws and to be governed by them-”codes, courts and cops”
- Tribes and state have concurrent criminal and civil jurisdiction over Indian crimes;
- Tribes have exclusive regulatory jurisdiction over Indians on its lands;
- Tribes have no criminal jurisdiction to try and punish non-Indians, with exception of Domestic Violence;
- Tribes civil and regulatory jurisdiction non-Indians is limited by MT test.

